Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

EUGENE JOHN MAUREY,
Petitioner,

versus

UNIVERSITY OF SOUTHERN CALIFORNIA and EDWARD J. BLAKELY,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

Circumstances Warranting Disqualification of Judge:

1. When the trial judge is an alumna of one of the parties, and is actively involved in alumni activities, fundraising, and other activities on that party's behalf (*e.g.*, donating money and time, wooing contributors, and serving on a committee of counselors), at what point and at what level of involvement should the judge disqualify herself, or be disqualified, to avoid the appearance of bias? (A related question -- the proper standard to apply when reviewing denial of a motion to disqualify – also should be decided, in part to resolve a conflict among the Circuits.)

2. What process is due on a motion to disqualify? Specifically, what are the due process consequences when the judge with the possible conflict, and the putatively neutral judge assigned to decide the motion, both inexplicably engage in irregular procedures that short-circuit the normal process and exacerbate the appearance of bias; the moving party is given only two days following disclosure to investigate the scope of the possible conflict and file a motion, then faulted for not explaining the facts better; and the "neutral" judge deciding the motion turns out to have the same potential conflict as the judge whose impartiality he is reviewing, and actually cites that fact as a ground for not disqualifying her?

Procedural and Evidentiary Rulings:

3 Was it an abuse of discretion for the district court to deny Petitioner more time to conduct discovery and bring discovery motions under FRCP 56(f), and to instead grant summary judgment for defendants, when Petitioner's key witness had withdrawn (but not recanted) a critical declaration (creating an uncertainty about his testimony that could only be resolved by taking his deposition); the regional director of the U.S. Economic Development Administration was "playing favorites" (breaking

federal regulations by providing evidence to respondents, while refusing even to speak with petitioner); and nine defense witnesses -- including two whose declarations were received in evidence over objection and relied upon by the district court in its opinion – refused to appear at their depositions?

4. Did the district court make correct evidentiary rulings when it:

(a) Received into evidence a declaration ("Smith declaration") provided to defense counsel by a senior federal agency official in violation of Commerce Department regulations, when that official refused to speak to Petitioner's attorney and the same regulations effectively made him immune from compulsory process?

(b) Received into evidence declarations from two USC-affiliated witnesses who earlier had failed, without excuse, to appear at their depositions (and who could not be compelled to attend, because the court denied Petitioner leave to bring such a motion)?

(c) Declined to receive into evidence, a declaration extremely favorable to Petitioner ("McClure declaration"), on grounds that the witness changed his mind and asked that the declaration not be used, when there was no suggestion that the declaration was false or inaccurate, the witness never recanted its contents, and the witness had participated in its drafting and executed it voluntarily under penalty of perjury?

5. Did the unusual procedural irregularities and plainly unsettled state of the evidence, which made it unclear what the actual testimony of key witnesses would be, give rise to a "genuine issue as to any material fact" making summary judgment improper?

Sufficiency of the Evidence on Summary Judgment:

6. What precisely must the plaintiff-employee prove to establish a *prima facie* case under *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792 (1973), when the case is for so-called "reverse" discrimination and the employee therefore cannot establish membership in a "minority" or generally "disadvantaged" group?

7. Under what circumstances may a racially biased employer evade liability for employment discrimination by asserting that the employee's termination was directed by a third party decisionmaker (here, a government agency that funded the employee's position)? Questions included under that umbrella include: (a) How much influence must the employer have over the decisionmaker to be held liable for its decisions? (b) Should a racially biased employer escape liability for wrongful termination, on grounds that the third party decisionmaker decided to terminate the employee's funding, if the employer helped that outcome occur by slandering the employee to the decisionmaker ("poisoning the well")? (c) If the employer is insulated from liability for the third-party's decision to terminate the employee, can the employer nevertheless be held liable for its own adverse actions against its employee, such as making racially-biased remarks, false statements, etc., that otherwise might fall short of actionable harassment?

8. Did the lower courts impermissibly weigh evidence, ignore evidence helpful to Petitioner, and fail to give Petitioner the benefit of all reasonable inferences and presumptions in granting summary judgment to Defendants? In other words, does the evidence in this case create triable issues under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)?

TABLE OF CONTENTS.

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. iv

TABLE OF CITED AUTHORITIES. vi

CITATIONS OF REPORTS OF OPINIONS AND ORDERS IN THIS CASE. viii

BASIS FOR JURISDICTION IN THIS COURT. viii

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS. viii

STATEMENT OF THE CASE. 1

ARGUMENT AND REASONS TO ALLOW THE WRIT:. 8

I. JUDGE MANELLA SHOULD HAVE BEEN DISQUALIFIED

A. The Court Should Resolve a Conflict Among the Circuits As to the Standard of Review 8

B. There is Sufficient Appearance of Partiality Here to Warrant Disqualification of Judge Manella (and of Judge King From Hearing the Motion) 9

C. Judge Manella's Membership in a USC "Board of Councilors" Gives Her a "Financial Interest" in USC as a Matter of Law 15

D. Petitioner Has Been Denied Due Process 15

E. The Failure to Recuse Judge Manella Substantially Affected the Outcome of The Case 16

II. THE LOWER COURTS MADE PREJUDICIAL PROCEDURAL/EVIDENTIARY ERRORS. 17

A. Denying Petitioner's Motion for Additional Time for Discovery and Motion Practice 17

B. The Smith Declaration Should Not Have Been Received in Evidence 18

C. The McClure Declaration, On the Other Hand, Should Have Been Received in Evidence 18

D. The Confused and Ambiguous State of the Evidence Itself Gave Rise to a "Genuine Issue" as to What the True Facts Were, Warranting Denial of Summary Judgment 21

III. EVEN SETTING ASIDE THE PROCEDURAL AND EVIDENTIARY FLAWS DESCRIBED ABOVE, THE RECORD EVIDENCE WAS INSUFFICIENT TO PERMIT SUMMARY JUDGMENT FOR RESPONDENTS. 22

A. Respondents May Not Evade Liability by "Passing the Buck" to the EDA 22

B. The Lower Courts Impermissibly Weighed Evidence, Drew Inferences and Indulged Presumptions Against Rather than For Petitioner. 25

IV. CONCLUSION. 28

APPENDIX. ..... Follows p. 28

TABLE OF CITED AUTHORITIES.

Cases

United States Supreme Court:

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) iii,22
Mistretta v. United States, 488 U.S. 361,
109 S.Ct. 647, 102 L.Ed. 714 (1989) 9
Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133, 120 S.Ct. 2097 (2000) iii,22,23,24,27,28

United States Courts of Appeal:

Boone v. United States, 944 F.2d 1489 (9th Cir. 1991) 8
Chuang v. University of California, 225 F.3d 1115
(9th Cir. 2000) 25,26
Easley v. University of Michigan, 853 F.2d 1351
(6th Cir. 1988) 11
Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) 24
Hilao v. Estate of Marcos, 95 F.3d 848
(9th Cir. 1996) 8
Hirsh v. Justices of Superior Court, 67 F.3d 708
(9th Cir. 1995) 8
Hook v. McDade, 89 F.3d 350 (7th Cir. 1996) 8
Johnson v. Paradise Valley Unified School Dist.,
251 F.3d 1222 (9th Cir. 2001) 25
Kaimowitz v. Board of Trustees of the University of
Illinois, 951 F.2d 765 (7th Cir. 1991) 10
London v. Coopers & Lybrand, 644 F.2d 811
(9th Cir. 1981) 24
Lunde v. Helms, 29 F.3d 367 (8th Cir. 1994) 11
Schwarzschild v. Tse, 69 F.3d 293 (9th Cir. 1995) 8
United States v. City of Spokane, 918 F.2d 84
(9th Cir. 1990) 8
United States v. Spillone, 879 F.2d 514
(9th Cir. 1989) 8

United States ex rel. Hochman v. Nackman, 145 F.3d 1069 (9th Cir. 1998) 11
United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990) 15

Constitution of the United States:

Amendment V 15,18

Statutes:

28 U.S.C. § 455(a) 10
28 U.S.C. § 455(b) 15
28 U.S.C. § 455(b)(4) 15
28 U.S.C. § 455(d)(4) 15
42 U.S.C. § 2000e-2 4
42 U.S.C. § 2000e-3 4

Code of Federal Regulations:

15 C.F.R. §§ 15.11 - 15.16 18

Federal Rules of Civil Procedure:

F.R.C.P. 6(e) 13
F.R.C.P. 56(c) 22
F.R.C.P. 56(f) 17,18,21

Federal Rules of Evidence:

F.R.E. 102 20
F.R.E. 402 20

Other:

Burton's Legal Thesaurus (Macmillan, 1980) 15

CITATIONS OF REPORTS OF OPINIONS AND ORDERS IN THIS CASE.

The opinion of the United States Court of Appeals for the Ninth Circuit, and the Memorandum of Decision of the District Court for the Central District of California, were unreported. They are set forth at Appendix pp. 41 and 51, respectively.

BASIS FOR JURISDICTION IN THE SUPREME COURT.

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court for the Central District of California was filed on June 21, 2001 (App., p. 41). Petitioner sought reconsideration; the Court of Appeals enlarged its opinion but otherwise denied reconsideration in an order entered on August 23, 2001 (App., p. 51). On Petitioner's application, Justice O'Connor enlarged Petitioner's time to file this Petition to December 20, 2001. This Court has jurisdiction to review the judgment and order in question on a writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED.

United States Constitution, Amendment V
(Due Process and Equal Protection):

No person shall ... be deprived of life, liberty, or property, without due process of law....

United States Code
28 U.S.C. Section 455
(Disqualification of justice, judge, or magistrate):

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning

the proceeding; ...
(4) He knows that he, individually or as a fiduciary, ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(5) He ... : (i) Is a party to the proceeding, or an officer, director, or trustee of a party... .
(d) For the purposes of this section the following words or phrases shall have the meaning indicated: ...
(3) ``fiduciary'' includes such relationships as executor, administrator, trustee, and guardian;
(4) ``financial interest'' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that ...
(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a ``financial interest'' in securities held by the organization;
(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Title 42, Section 2000e-2
Unlawful employment practices
(Discrimination)

(a) Employer practices. It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin....
(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice....

Title 42, Section 2000e-3
Other unlawful employment practices
(Retaliation)

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Federal Rules of Civil Procedure

Rule 56(c):

... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

Rule 56(f):

When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Code of Federal Regulations

See Appendix, p. 54.

STATEMENT OF THE CASE.

This is a "reverse" employment discrimination action. Petitioner (plaintiff below) is a middle-aged, middle-class white male. In 1988, he was hired by the University of Southern California ("USC") to work in a government-funded economic development/technology transfer program (a high-tech version of moving Tang from the space program to the supermarket aisle).

In 1992, Petitioner became Director of the USC Center for Economic Development ("Center" or "University Center"), a community economic development program funded primarily by the Economic Development Administration ("EDA"). Although Petitioner was the Center's Director, the EDA designated his supervisor, George Evans, its Principal Investigator. As such, Evans -- not Petitioner -- was responsible for the Center's overall direction, relationships with other University departments, and support and staffing levels. Administratively, the Center was placed within the School of Engineering.

During Petitioner's tenure, the Center consistently met EDA program goals, and Petitioner consistently received "outstanding" performance reviews. Nevertheless, Petitioner came to believe that the Center was not as successful as it could be: Evans knew little about economic development and could contribute little in the way of guidance or direction; he treated the Center as a source of income to USC instead of supplementing the federal funding with other money and resources, as EDA wanted; and engineering students were not interested in community economic development, making it difficult to staff the Center with graduate students.

In early 1996, EDA assigned a "peer review team" to evaluate the Center's operations. Petitioner saw an opportunity to address these problems. He candidly told the peer reviewers about the lack of support and direction within the School of Engineering, pointed out that scattering programs among the different Schools at USC made it difficult to coordinate economic development efforts, suggested that the Center be moved to the School of Urban Planning, and, ironically, introduced the team to the dean of that

School. The peer review team followed Petitioner's advice; their report to the EDA praised some aspects of the Center's operations, but criticized USC's lack of support for it and recommended it be moved to Urban Planning.

Edward Blakely, dean of the School of Urban Planning, is a charismatic, politically active[1] African American/Hispanic man with a strong interest in minority community development. Unbeknownst to Petitioner at the time, Dr. Blakely holds some troublesome views on race, including the perception that white people are hampered in economic development roles because minority communities are themselves prejudiced and have difficulty relating to them, and a willingness to accommodate that perceived prejudice.[2]

At this point, Petitioner had been a USC employee for eight years, helped found the Center in the first place, received "outstanding" performance reviews, had no disciplinary record, and had just disrupted his work situation in hopes of bettering the Center. As soon as he was sure the Center was moving to his School, Dean Blakely fired him. Blakely told him that, under Blakely's leadership as the new Principal Investigator, Petitioner's position was being eliminated -- the Center would not have a Director below the Principal Investigator (Blakely). Not long afterward, however, Blakely did create a "Director" position -- and hired a less qualified , African-American man, who once had referred to Petitioner as his "white chauffeur"in Blakely's

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[1] Among other things, Dr. Blakely ran unsuccessfully for mayor of Oakland, California during the pendency of this lawsuit, and was appointed by President Clinton to a commission overseeing the Presidio in San Francisco.

[2] Examples of Dr. Blakely's bias include his publishing an article critical of "white middle class values," laughing at a comment made by another African-American about how nice it was to have a "white chauffeur" (Petitioner) drive their car, teasing Petitioner about missing the race "revolution," and calling Petitioner "paleface" and advising him to "go to the beach" before visiting minority community groups. Dr. Blakely has stated that "in L.A. politics are more important than substance" and that minority groups should be allowed to work with minority-extraction economic development advisers if they desire, to accommodate their "cultural" prejudices.

presence, to fill it.

The School of Engineering dean in charge of personnel, David Shawaker, asked to meet with Blakely to see whether Petitioner's job could be saved. In that meeting, Blakely falsely told Shawaker that Petitioner had not performed well, had alienated others, and was not accepted by minority community groups receiving economic assistance.[3] Blakely expressed the opinion that, since minority community groups "unfortunately still harbor some racial bias," Petitioner's failure to be "Black or Hispanic" was a "strike against him." Shawaker related that conversation to Evans, who in turn told Petitioner.

Petitioner asked for help from USC's so-called "Affirmative Action" office, which promised to investigate but failed to do so.[4] He also confronted Blakely, who offered him a short-term interim position, subservient to Mitchell, if Petitioner promised not to give him any more "s**t" (which Petitioner interpreted as an instruction not to complain further about discrimination). Faced with unemployment, Petitioner accepted the interim position.

Relying on promises in USC's personnel policies that "every effort" would be made to re-employ him and that laid-off employees would be given "first preference" for new job openings, Petitioner also submitted dozens of applications for open positions at USC (which brags of being the largest private employer in Los Angeles); however, though he unquestionably was qualified for those jobs (USC's employment office pre-screens all applications to be sure the applicants are qualified), he was never re-hired, not

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[3] None of those alleged shortcomings are documented in Petitioner's personnel file, no disciplinary proceedings had ever been taken against him, and USC's personnel policies stated that Petitioner could not be disciplined or terminated for misconduct absent formal process. USC never sought any statements to document its contentions until after Petitioner complained of discrimination.

[4] The director of the USC Affirmative Action office never even spoke with Blakely, nor Evans nor Shawaker, about these matters until after Petitioner filed a complaint with the United States Equal Employment Opportunity Commission.

even for jobs he previously had held and succeeded in. In most cases, non-USC-employees with equivalent or lesser credentials were hired instead. In the meantime, although the interim position turned out to be nearly intolerable -- he was being supervised by the less-qualified interloper Mitchell, he was instructed not to speak with his coworkers, and Mitchell tried forcefully to take his computer away from him -- he stuck with it until it expired, at which point he became unemployed. Petitioner filed a charge of discrimination with the EEOC, obtained a "right to sue" letter, and on December 15, 1998 filed suit under, *inter alia,* 42 U.S.C. §§2000e-2 and -3. Concerned about what he perceives as a pervasive pro-USC bias in the Los Angeles area, he filed his suit in the Northern District of California (where Blakely lived), but on March 26, 1998 the case was ordered transferred to the Central District of California and assigned to the Hon. Margaret M. Morrow. On January 19, 1999, the case was reassigned to the newly-confirmed Hon. Nora M. Manella.

In January, Petitioner noticed the depositions of twelve USC employees. Those depositions were properly noticed under the existing scheduling order, but were scheduled close enough to the current motion cutoff that absent an order shortening time similar relief from the court, there would not be enough time to move to compel if witnesses failed to appear. Only three of the twelve witnesses showed up.

On March 22, 1999, Respondents moved for summary judgment, supported in part by declarations from two of their employees who had not attended their depositions. Respondents' motion offered a new explanation for Petitioner's termination (their third); this time, their theory was that the peer review report, which had recommended transferring the Center to Urban Planning at Petitioner's suggestion, should be construed as an indictment of Petitioner's performance as its Director. According to them, every program weakness identified in the report -- including the ones Petitioner himself had drawn to the reviewers' attention -- was exclusively Petitioner's fault, and that in the face of such massive criticism, USC had no choice but to terminate Petitioner or else lose EDA funding.

That theory ignored the facts that many of the report's findings were suggested by Petitioner; that the report itself identified Principal Investigator Evans, not his subordinate Petitioner, as the person responsible for the Center's goals, policy direction, and level of support from USC; and that the report itself contained a clear statement that "lack of support at higher levels of University management hampers Center efforts." In other words, this theory was incorrect. However, Respondents had attempted to bolster their argument with a declaration from Leonard Smith, the director of the EDA's Western Region, to whom the peer reviewers had reported. Although Mr. Smith had not been a part of the peer review team, had never spoken with Petitioner about the matter, and under EDA regulations did not have the authority to make staffing decisions unilaterally, he nevertheless stated in his declaration that based on the peer review report, he would not have approved funding Petitioner's continued employment if it had been suggested.

Hoping to clear up what he optimistically believed was simple confusion over what the peer reviewers had intended, Petitioner's counsel tried several times to reach Smith on the telephone, but Smith refused to take his calls. Petitioner's counsel sought help from the EDA's counsel, but an EDA staff attorney delivered the message that Smith refused to talk to him.

On April 6, 1999, Petitioner moved *ex parte* for leave to conduct additional discovery and to bring discovery motions or, alternately, for an order shortening time to bring a similar motion on other than an *ex parte* basis. In an order that mischaracterized the dealings between Petitioner and USC, the court denied that motion. App., p. 1.

On May 4, 1999, twenty days before the scheduled summary judgment hearing, Judge Manella mailed the parties a civil minute reading as follows:

> The parties are advised that Judge Manella is a member of the Board of Councilors of the University of Southern California Law School. The Law School is not a party to this litigation, and the Court has no plans to disqualify

> itself. Any objection to Judge's [sic] Manella's presiding over this case should be filed, no later than May 7, 1999.

Petitioner's local counsel received this disclosure in the mail on May 5, leaving 48 hours to investigate and file a motion to disqualify. Lacking any opportunity to conduct an adequate investigation, let alone discovery, Petitioner turned to USC's Internet web site for information. There, he learned that the law school is not a separate entity, as the civil minute implies, but is part of the same corporation that was a defendant in this lawsuit. The relatively little information he could glean also suggested that Judge Manella's involvement with USC was not limited to alumni association membership or a small annual contribution, but is quite active and closely involved with fundraising (*e.g.*, going to dinner with a contributor who had won "dinner with a federal judge" as a raffle prize at a USC fundraiser). Contrary to a later court finding, Judge Manella did not just support law school public interest fundraisers, but contributed time and money to a University-wide fundraising campaign that potentially was an issue in this case.[5] And it appeared that the "Board of Councilors"

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[5] USC's perpetual focus on money was part of the "theme" of Plaintiff's case. For example, relative to his contract and retaliation claims, Petitioner sought to establish that in one instance USC hired, instead of Petitioner, an individual who was not entitled to "first preference" to rehire under USC's layoff policy but had used his influence in a corporate position to arrange millions of dollars worth of contributions to USC. Such incidents also provided context and support for other elements of Petitioner's claims (for example, Evans' desire to have USC profit financially from the University Center program, which was one of the reasons Petitioner thought it should be moved). These considerations factored into Petitioner's decision to seek Judge Manella's recusal. He was concerned that, as an active contributor and fundraiser on USC's behalf, she might be less than neutral in ruling on the admissibility of evidence critical of USC's cupidity for contributions and grants. He also was concerned about Judge Manella's participation in the recent University-wide fundraising campaign, which had raised over $1 billion for USC's endowments. If Petitioner prevailed in this lawsuit, he intended to highlight the success of that fundraising campaign as a consideration in any award of punitive damages. As a contributor to that same campaign, she would have been in an awkward position in ruling on any motion for remittitur.

is not merely an alumni association -- the USC law school alumni association is "Legion Lex" -- but an advisory board of some kind.

Troubled as much by the implications of the court's tardy and incomplete disclosure of the conflict, its immediate insistence that it would not recuse itself and its insistence on an unreasonably short time-frame as he was by the judge's involvement in USC's affairs, Petitioner moved to disqualify Judge Manella based on the limited information available to him.

The motion was assigned to the Hon. George H. King, another USC alumnus, who denied it without waiting for a reply brief or oral argument, so rapidly that Petitioner received the order denying the motion two days before receiving the clerk's notice assigning Judge King to hear it. Judge King's order did not take any of the procedural irregularities into account in assessing the appearance of bias – in fact, it faulted Petitioner for failing to adequately explain the nature of the Board of Councilors, which Petitioner had not been able to determine in the short time available – and it included the following, rather astounding, circular reasoning:

> Indeed, this court has similar involvement with the [USC] Law School. But we are of the view that such involvement is not any basis for our disqualification from entertaining this motion.

Seven days later, on May 24, 1999, Judge Manella made a number of discretionary rulings prejudicial to Petitioner's ability to present all the relevant evidence,[6] and granted Respondents summary

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[6] Those rulings – affirmed by the Court of Appeals as within the District Court's discretion – included denying Petitioner's renewed request to continue the hearing to allow further discovery (especially in light of the muddy circumstances surrounding the Smith and McClure declarations) and to permit Petitioner to move to compel depositions of the nine "no show" USC employees; overruling Petitioner's objection to USC's submission of declarations from two of those "no shows"; overruling Petitioner's objection to the Smith declaration; and sustaining an objection to the McClure declaration offered by Petitioner, which rebutted Smith's. Different rulings on these issues would have greatly impacted

judgment on all claims. Judgment was entered on July 2, 1999. (App., p. 7.) Petitioner timely filed a Notice of Appeal on July 30, 1999.

ARGUMENT AND REASONS TO ALLOW THE WRIT.

I. JUDGE MANELLA SHOULD HAVE BEEN DISQUALIFIED

A. The Court Should Resolve a Conflict Among the Circuits As to the Standard of Review.

The Ninth Circuit generally applies an "abuse of discretion" standard in disqualification cases. *See, e.g., Hirsh v. Justices of Superior Court*, 67 F.3d 708, 715 (9th Cir. 1995). However, other courts have applied a less strict standard, *e.g., Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996)(*de novo* review). There is good reason for that standard: avoiding the appearance of impropriety is in the best interests of the judicial system as a whole. Petitioner submits that denial of a motion to disqualify should not be accorded deference, but reviewed *de novo*.

This is consistent with general legal principles. A district court's interpretation of the federal rules ordinarily is reviewed *de novo. Hilao v. Estate of Marcos*, 95 F.3d 848, 851 (9th Cir. 1996); *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995). Mixed questions of law and fact generally are reviewed *de novo, Boone v. United States*, 944 F.2d 1489, 1492 (9th Cir. 1991), *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989); especially when they involve constitutional rights, *United States v. City of Spokane*, 918 F.2d 84, 86 (9th Cir. 1990). This Court has confirmed in many decisions that 28 U.S.C. 455(a) is an objective,

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the outcome of this case, and, while Petitioner is aware that many recusal motions are merely after-the-fact "sour grapes," and does not want to join their ranks in this Court's mind, the fact remains that every discretionary ruling Judge Manella made in this case favored USC.

not subjective, test, which makes it especially appropriate for *de novo* review, since the presence or absence of actual bias is not an issue. Since recusal motions always implicate constitutional due process, appellate review concerning whether a particular fact pattern requires disqualification under 28 USC Section 455(a), at the very least, should be *de novo.* At most, the "abuse of discretion" standard should be used only on the question of whether actual bias exists, as distinguished from apparent bias or presumptive bias, exists. Since the Court of Appeals here utilized a different standard, its decision should be reversed and remanded.

B. There is Sufficient Appearance of Partiality Here to Warrant Disqualification of Judge Manella (and of Judge King From Hearing the Motion).

Petitioner's discomfort with Judge Manella's impartiality is not, as the lower courts analyzed it, based solely on her activities as a USC alumna. It is the whole set of circumstances that Petitioner finds disturbing -- the combination of her laudable involvement in USC's affairs and her short deadline to object and the subtle inaccuracy and incompleteness of her disclosure and the consistency of her rulings favoring USC and her "rush to judgment" (both on the recusal issue and on summary judgment), taken together, that gives Petitioner pause. Add in the facts that Judge King also bypassed the usual motion procedures, also hurried things along with unusual swiftness and also was a USC alumnus, and the suspicion that something is fishy does not seem unreasonable.

The judicial branch's reputation for scrupulous impartiality is the currency that enables the courts to take difficult stances on hard issues -- abortion, gun control, civil rights, even the outcomes of Presidential elections -- without breaking faith with the American public. Our citizens tend to give the courts the "benefit of the doubt" even when they disagree with them -- and the critical basis for such trust is the deep-rooted belief that even though they sometimes make human mistakes, the courts in our country are always honest, always impartial. This Court has repeatedly and unreservedly endorsed this principle; *see, e.g., Mistretta v. United*

States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed. 714 (1989)("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship").

Congress had the same idea when, in 1974, it eliminated the so-called "duty to sit" and revised 28 U.S.C. Section 455 to require judges to err on the side of caution, recusing themselves whenever their impartiality "might reasonably be questioned."

Yet although it is easy to find cases articulating the importance of a judiciary free even from the perception of bias; and not hard to find cases where judges graciously step aside at a party's request, it is rare to find cases in which a judge enforces that doctrine on a recalcitrant colleague; judges who decline to recuse themselves are almost never recused involuntarily by their brethren. That may be the correct result in most cases – judges recuse themselves voluntarily in most of the meritorious cases, so the cases that lack merit are more frequently contested. the ones that get contested.

Petitioner will reiterate that his recusal motion is based on more than Judge Manella's "alumni" activities; the lower courts erred by failing to seriously consider the impact that the procedural irregularities, on top of Judge Manella's and Judge King's alumni affiliations, would have had on the mind of the "man on the street." However, the cases merely involving judge-alumni, such as the ones relied on by the lower courts here, provide good examples of how the law may have evolved to be more protective of the bench's right to sit than of the good citizen's right to an unquestionably neutral forum.

A natural progression can be seen in these cases. The simplest hold simply that a judge's past matriculation at a particular school did not disqualify him; *see, e.g.,Kaimowitz v. Board of Trustees of the University of Illinois,* 951 F.2d 765 (7th Cir. 1991)("we do not find meritorious [the] contention that Judge Baker should have recused himself from this case because he attended and graduated from the University....")(*id.* at fn. 2). That makes sense; merely graduating from an institution is a matter of history, which by itself may have little relationship to present prejudices.

Next come the cases, usually citing the first type, that also

excuse a judge's present but relatively passive relationship with his alma mater (for example, continuing to pay dues to the alumni association, or making a contribution every year when the inevitable phone call comes). *See, e.g., Lunde v. Helms,* 29 F.3d 367 (8th Cir. 1994); *United States ex rel. Hochman v. Nackman,* 145 F.3d 1069 (9th Cir. 1998)(case involving USC-affiliated medical clinic; court noted that USC was not a named party and that "[t]he Judge's main contact with USC was a small yearly contribution to the law school's alumni association"). Again, such cases make sense, because those kinds of contacts can be viewed more as artifacts of past history than signs of an active, ongoing interest or investment.

However, some cases, and sweeping dicta in others, either state or imply that even ongoing, active rather than passive, activities by a judge in support of her alma mater are acceptable, so long as they can be characterized as "normal" for an alumnus. *See, e.g., Easley v. University of Michigan,* 853 F.2d 1351 (6th Cir. 1988). This last category is what concerns Petitioner. 28 U.S.C. Section 455(d)(4) makes it clear that a judge who is an active participant in a party's affairs may not sit (and, with regard to educational institutions in particular, only grants one narrow exception, for litigation involving "securities held by the organization"). The first two categories of cases -- judges with past or relatively passive relationships with their alma maters -- may be correct, but to sanction ongoing, active alumni activities runs counter to this plain language requiring recusal of judges who are "active participant[s]" in a party's affairs.

The impact of this last category of case is even worse, because they come close to articulating a firm rule that "normal" alumni are not recusable as a matter of law. There are at least two problems with this. First, what is "normal" is highly subjective. The external measures may not be accurate: one alumnus with season football tickets might simply enjoy the fresh air and crowds, without being unusually attached to the institution, while another who lives too far away to hold season tickets might be so fervent that he has the mascot tattooed on his chest. A wealthy alumna might contribute $25,000 annually yet be relatively

unconcerned about its financial affairs; a poorer alumna might stretch to donate $1,000 but be deeply concerned that a large punitive damage award against the school might cause the trustees to de-fund a struggling campus program she is fond of.

Second, a rule of law that activities of an alumnus do not disqualify him prevents more individualized analysis and puts the presumption on the wrong side. The statute and the dicta seem clear: when in doubt, sit it out. The cases rubber-stamping a judge's participation in alumni activities discourage the sort of individualized analysis that would best protect the integrity of the judiciary and the rights of the litigants.

The proper test should focus on the statutory phrase "active participant." Judges who are "active participants" in a party's affairs – i.e., judges who have a living, ongoing relationship with their alma mater rather than a perfunctory one based on their past relationship -- should not sit.

This approach makes common sense in terms of the perception of the "man on the street," as well. It is no accident that we call our universities (in Latin) our "soul mothers" nor that the word "fan" derives from "fanatic"; nor that some families have attended the same school for generations (and would excommunicate a family member who matriculated at the cross-state rival). While most people are merely fond of the schools they graduated from, a fair number are more rabid, and it is not unreasonable for a litigant to at least suspect that a judge is partial to his alma mater. When that judge has gone out of her way to participate in that alma mater's activities in an active, ongoing way -- remains an "active participant in [that] party's affairs," in the words of the statute -- almost every layperson would say that, all things being equal, it would be more fair if that judge did not sit.

In light of what the statute says and what common people know to be true, the caselaw holding, as a matter of law, that being a "normal" alumnus could never cause a reasonable person to suspect a judge of partiality, is overprotective of the judge. Certainly there may be partiality in that circumstance. It may be suppressed, or it may pop up in a harmless fashion (a little leniency in granting a continuance) -- but that possibility is real

enough that a concerned litigant, in a courthouse with other judges capable of stepping in, should be able to ask that the judge step aside. To the extent the "alumni judge" cases cited above hold to the contrary, they should be corrected, if not overruled, and this case should be remanded to a different judge.

The appearance of bias here is magnified tenfold by the procedural irregularities. One might overlook Judge Manella's activities as an alumna; but try asking any nonlawyer what they would think about this litany of facts: a party expresses concern about facing pro-USC bias in a courthouse located only ten miles away from it, in a town where USC is the largest employer. Nevertheless, his case is transferred to that courthouse and assigned to a judge who is not merely a USC alumna, but serves on some sort of advisory board, contributes substantial amounts of time and money, and has used her position as a judge to benefit USC (remember the "dinner with a federal judge" fundraising raffle prize). Even though USC's involvement is clearly stated in the caption of the case, she does not disclose her alumna status until the last minute, then does so incompletely and incorrectly. (This also means that she went to the same law school USC's lead counsel teaches at and his two associates attended.) Even though FRCP 6(e) assumes that mail takes three days to arrive, she arbitrarily requires that any motion to recuse her be filed exactly three days after she places her disclosure in the mail. When a recusal motion is timely filed anyway, it is assigned to another USC alumnus to decide. The second alumnus does not wait for reply papers, and does not allow oral argument, but denies the motion so quickly that counsel does not even know he was assigned to the matter until two days after receiving his order denying it. In his opinion, he does not even mention the accelerated timeframe but faults the party for not being thorough enough in its investigation. Seven days after the motion is denied, the first alumna-judge denies the party's request for more time to complete his case, makes several discretionary rulings that all favor USC, turns a blind eye to USC's unexplainable refusal even to produce nine witnesses when it was supposed to, deems the

party's entire case worthless, and throws it out instead of letting a jury decide. Any tourist on First Street or Maryland Avenue will say that it is reasonable to at least suspect both judges were doing their best to ensure that recusal did not occur and that their impartiality "might reasonably be questioned."

The assignment of the recusal motion to Judge King deserves to be specifically addressed. He admitted, not merely being another USC alumnus, but having precisely the same sorts of entanglements as Judge Manella. While the Court of Appeals rationalized that assigning the disqualification motion to any other judge negated any possibility of bias, the fact remains that Judge King was exactly the wrong person to resolve the issue. Both to protect the fact and appearance of impartiality, and as a matter of mathematical logic, a motion to disqualify should almost never be ruled on by a judge with the same alleged disability: if a litigant moved to disqualify a judge for being short, it should be a tall judge that denies the motion.[7] It is like the philosopher who was asked what the Earth rested on. "An elephant," he replied. And what does the elephant stand on? "A turtle." And what does the turtle stand on? "Ah, my child, it's turtles all the way down." A motion to disqualify a USC alumnus, denied by another USC alumnus, is turtles on turtles, smacking of impropriety, when the problem could easily have been solved by having the turtle stand on a Wolverine, Bruin, or Golden Bear.

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[7] The obvious exceptions would be cases of necessity, such as when there is only one other judge in the courthouse or where the recusal motion is based on a characteristic common to all judges such as being federal employees, and cases where the grounds asserted for recusal are both patently unlawful and offensive, such as a motion to recuse a judge based on that judge's race: Petitioner would have no problem with an African American judge ruling on a motion to recuse a colleague merely for being African American.

C. Judge Manella's Membership in a USC "Board of Councilors" Gives Her a "Financial Interest" in USC as a Matter of Law.

As to Section 455(b) presumptive bias, Judge King analyzed the wrong clause of the statute. He focused on the question of whether Judge Manella was a fiduciary, whereas the relevant clause is the next one, 28 USC Section 544(b)(4), which mandates disqualification of any judge with a "financial interest" in a party. As pointed out above, Section 544(d)(4) defines "financial interest" broadly as:

> ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party (emphasis added).

Judge Manella unquestionably is an "active participant" in USC's affairs. Moreover, it appears that the Board of Councilors Judge Manella belongs to, which is different than the alumni association, is some kind of advisory board. The name certainly suggests it: in Burton's Legal Thesaurus (Macmillan, 1980), the first synonym for "counselor" is "advisor," and a party's advisor absolutely may not sit.[8]

D. Petitioner Has Been Denied Due Process.

The Fifth Amendment guarantees all persons due process of law, which requires an impartial decisionmaker. *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990)(referencing "the

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[8] To the extent the record is vague about the exact nature of the Board of Councilors – a factor Judge King cited in denying the recusal motion below – the Court must keep in mind that this vagueness in not Petitioner's fault, but is due to the extremely short time the district court allowed for the underlying motion to be researched and filed. Since the name "Board of Councilors" itself suggests a counseling or advisory role, and since a judge who is a party's advisor may not sit, Petitioner should be entitled to the benefit of the presumption that is indeed is what is appears to be, because there is no contradictory evidence in the record and section 455 is clear that even the question of bias should result in recusal.

constitutional demand that judicial proceedings be conducted by a 'neutral and detached judge' (citation omitted)). Petitioner has been deprived of that right twice: once in having his case adjudicated by Judge Manella, and again in having his disqualification motion adjudicated by Judge King. Further, although not every aspect of the FRCP rises to the level of a constitutional guarantee, an unexplained, unnecessary deviation from the usual procedures, in a situation where the impartiality of the judge causing that deviation is in question, has due process implications and should be strictly scrutinized. There was no reason to set such a short deadline for a disqualification motion, no reason not to allow enough time for reasonably limited discovery, and no reason to deprive Petitioner of the ability to file reply papers or argue orally. On such facts, the process fell short of constitutional requirements.

E. The Failure to Recuse Judge Manella Substantially Affected the Outcome of the Case.

On first consideration, it may seem that any bias on the part of Judge Manella was obviated by the Court of Appeals' *de novo* review of her grant of summary judgment, so that the failure to disqualify her was harmless error. However, under the abuse of discretion standard, the Court of Appeals gave great deference to district court rulings refusing preventing Petitioner from compelling the depositions of defense witnesses, declining to continue the hearing to allow time to sort out the Blakely and McClure declaration problems, etc. Those rulings almost preordain the outcome of the summary judgment motion itself: for example, absent the Smith declaration the district court could not have ruled as it did, and if the McClure declaration had been admitted the Court of Appeals could not have ruled as it did. A different judge very easily could have made different rulings on those motions, with tremendous impact on what sort of record the higher courts were presented with for review. Therefore, any error in denying Petitioner's disqualification motion was prejudicial and warrants reversal of all rulings made after that motion was brought.

II. THE LOWER COURTS MADE PREJUDICIAL PROCEDURAL/EVIDENTIARY ERRORS.

A. Denying Petitioner's Motion for Additional Time for Discovery and Motion Practice.

Prior to the summary judgment hearing, Petitioner filed a motion *ex parte* to continue the summary judgment hearing and for leave to conduct additional discovery, and to move to compel the depositions of the witnesses who had failed to appear, pursuant to FRCP 56(f). The court denied the motion for additional discovery, and failed even to acknowledge the request for leave to bring discovery motions. Petitioner renewed those motions at the summary judgment hearing. The relief requested was critical, both because of the problems that had arisen with the McClure and Smith declarations and the nine witnesses who failed to appear, and because -- despite the district court's hard words about Petitioner's counsel's supposedly dilatory conduct -- the truth is that Petitioner in practical terms had only about one month to conduct all his discovery.[9] Given the tumultuous circumstances

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[9] A long story made short: In the Spring of 1988, at the inception of the lawsuit, Respondents noticed the deposition of Plaintiff without first consulting Petitioner's counsel's calendar. When counsel asked to reschedule due to a calendar conflict, Respondents agreed, but only if Petitioner agreed to preserve Respondents' "discovery priority" by abstaining from his own discovery efforts until Petitioner's deposition could be completed. Petitioner's counsel, perhaps naively, agreed, thinking this meant at most one or two months' delay. However, Respondents delayed rescheduling the deposition; insisted it by videotaped; and stretched it out to 8 days spanning half the year. As it turns out, this ploy to gain "discovery priority" and stall a plaintiff's discovery efforts is a tactic espoused by Respondents' counsel's law firm, recommended in a manual they published on employment litigation; and they used it to good effect here: they refused to relieve Petitioner from their agreement, and Petitioner's deposition was not finally concluded (and Petitioner free to begin conducting discovery) until January 1999 – at which time there was a January 31 discovery cutoff (later extended into mid-February). Even then Respondents stymied Petitioner's discovery efforts: Petitioner noticed twelve USC employee depositions in this narrow window, but 75% of those witnesses failed to appear. When Petitioner brought this situation to the district court's attention and sought relief, the court denied the motion – accusing Petitioner of being "dilatory" in conducting discovery. Check and checkmate by Respondents' counsel; but Petitioner himself deserves better.

described herein, the questions surrounding the Smith and McClure declarations, the short time this judge had had the file, and the relative youth of the case itself, the court's failure to enlarge the time for discovery under FRCP 56(f) was an abuse of discretion.

B. The Smith Declaration Should Not Have Been Received in Evidence.

Commerce Department regulations prohibit EDA employees from giving any information or evidence -- verbal or written, formal or informal -- to private litigants without first obtaining agency counsel's approval. 15 C.F.R. Section 15.11-15.16 (App., p. 54.) Here, EDA counsel did not give such approval. Thus, Smith ignored federal regulations when he felt like helping Respondents, but hid behind them when he wanted to avoid dealing with Petitioner. As a result, he has never heard Petitioner's side of the story, never reviewed the McClure declaration, never been cross-examined, and the speculations in his declaration -- that he would not have approved Petitioner's continued employment had it been proposed -- are based largely on false premises. Smith's actions constituted a denial by the EDA of Petitioner's rights to due process and equal protection under the Fifth Amendment.

However, Smith's declaration could do no harm unless it was received in evidence. I took the district court's imprimatur to give Smith's actions legal effect. Just as the exclusionary rule is employed in criminal cases, both to protect citizens from governmental misconduct and to discourage government officials from doing wrong, so the district court should have excluded Smith's declaration, on constitutional grounds, for the same reasons and to equalize the playing field.

C. The McClure Declaration, On the Other Hand, Should Have Been Received in Evidence.

Defendants contend that the decision to terminate Petitioner was not made by them, but by the EDA. Specifically, they argue that the peer reviewers were so critical of Petitioner that USC had

no option to retain him. The issue of whether the peer review report was a criticism of Petitioner (USC's contention) or his superiors (Petitioner's contention) was the subject of an extended colloquy with Petitioner's counsel in the Court of Appeals, and that court's opinion relies heavily on its conclusion that the peer review report could not possibly be interpreted as anything other than an unequivocal condemnation of Petitioner.

Yet that interpretation is completely exploded, not only by the words of the report itself (*see* discussion at pp. 25-26, .¶¶ (a) and (b), below), but also by the declaration of Thomas McClure, who led the peer review team, which states unequivocally that the peer reviewers were critical of USC management, not Petitioner; that Petitioner suggested many of the recommended improvements; and that the peer reviewers intended Petitioner would continue to serve as the Center's Director.[10]

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[10] In pertinent part, that declaration stated as follows:

"2. In my capacity as Chair of a peer review team, I visited the University of Southern California to review the University Center program, which then was housed in the USC School of Engineering. The impression I gathered in that review was that the University Center program was "lost" among the larger programs being operated in the School of Engineering, and that personnel above John Maurey's level were not paying it the attention it deserved.

"3. Mr. Maurey brought to the peer review team's attention the fact that USC's School of Urban Planning already was operating economic development programs, and suggested that relocating the program to that School might bring it more resources and attention. He put us in touch with the Dean of the School of Urban Planning, Edward Blakely.

"4. After meeting with Mr. Maurey and Dr. Blakely, the peer review team concurred with Mr. Maurey's suggestion that the Center for Economic Development would have a better "fit" in the School of Urban Planning. Accordingly, in our final report we recommended to the EDA that the program be moved.

"5. I do not recall being critical of Mr. Maurey in any way in our report. I feel that any difficulties his program had while at WESRAC [the School of Engineering unit overseen by Evans] were due to a lack of resources and support there. Mr. Maurey actually was very supportive of his program, expressed a desire to see it succeed, and was the prime instigator of its relocation to the School of Urban Planning. In no way did the peer review team intend or recommend that Mr. Maurey be terminated from his position or be disassociated from the Center

The district court declined to receive the McClure declaration because Mr. McClure changed his mind and, without recanting its contents or denying its accuracy, asked that it be returned to him.[11]

While it is interesting to speculate why Mr. McClure had this change of heart, his sudden desire to retract his declaration is not an adequate reason to exclude it from evidence. Admissibility depends on whether the evidence is relevant and reasonably reliable; *see* Federal Rules of Evidence 102 (Rules were enacted "to the end that the truth may be ascertained and proceedings justly determined") and 402 ("[a]ll relevant evidence is admissible" with few exceptions). A witness' desire not to testify is not among those exceptions. Compulsory testimony (normally, but not necessarily, pursuant to the subpoena power) is an everyday occurrence. A witness who comes to the courthouse voluntarily, but gets cold feet, can be compelled to take the stand anyway. This is no different.

Mr. McClure's declaration is immensely relevant, turning USC's contentions, and the reasoning of the lower courts, on their heads. No party and no court below has questioned its truthfulness, and indeed its truthfulness cannot honestly be doubted: Mr. McClure helped draft it, placed his signature on it voluntarily and under penalty of perjury, never defaced or struck that signature out, never recanted the substance of the declaration

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for Economic Development, just that the Center be moved."

[11]Shortly before the summary judgment hearing, and shortly after Petitioner had disclosed the contents of the declaration to Respondents' counsel, Mr. McClure sent a letter to Petitioner's counsel, formal in tone as compared to his previous friendly, cooperative manner, which stated in part:

"After reviewing the statement and the peer review report, I had decided that it was not necessary for me to make any statement regarding Mr. Maurey's actions. Mr. Maurey's actions, that lead to a meeting with Edward Blakely, are clearly set out in the peer report which is a matter of record. Therefore, I had decided not to submit any statement. ¶ Inasmuch as the submission of this statement was an error on the part of my secretary, I hereby rescind the statement and demand that it be destroyed and/or returned to me forthwith, and that no use of any kind be made of it...."

or suggested its contents were false -- in fact, his letter asking for its return suggests just the opposite, that he believes his declaration and the peer review report itself say the same things. The fact that the Court of Appeals' decision relies so heavily on an adamant belief that runs exactly counter to what Mr. McClure swears to, suggests that Respondents would not have obtained summary judgment had the declaration been received into evidence as it should have been.

D. The Confused and Ambiguous State of the Evidence Itself Gave Rise to a "Genuine Issue" as to What the True Facts Were, Warranting Denial of Summary Judgment.

When irregularities of the sort described above have arisen at the time set for hearing a summary judgment motion, the best course may be to continue the hearing so the court and parties can sort matters out under FRCP 56(f). However, since the district court denied Petitioner's request for such a continuance, it was error for it to grant Respondents' motion. FRCP 56(f) suggests that denying the motion in such circumstances is proper; Petitioner will go a step further and here proposes that granting the motion in such circumstances was positively erroneous. There were numerous "genuine issues" as to what the testimony of key witnesses would have been had the matter proceeded to trial. There is no reason to believe Mr. McClure would have recanted substance of his declaration, but if he had, Petitioner would have impeached him with it; who is to say which version the jury would have believed? The EDA official, Smith, either would have continued to hide behind his agency's regulations and declined to testify altogether, in which case his declaration also would have been inadmissible; or he would have appeared and testified in person, finally submitting to cross-examination; the best outcome Respondents could hope from such an encounter is for the jury to believe Smith's testimony instead of the contrary testimony of McClure and Petitioner, but that would be a jury question. Similarly, the two USC employees whose declarations were received in evidence despite their failures to appear at deposition would have been forced to submit to cross-examination, again

yielding credibility questions and other jury issues.

Petitioner was not required to prove a specific state of facts in order to survive summary judgment; even under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green, supra,* and its progeny, he only was required to establish the existence of "genuine issue[s]" aided by the benefit of all reasonable inferences and presumptions. The confused state of the evidence and uncertainties about key witnesses' true testimonies gave rise, without more, to a "genuine issue as to ... material fact" warranting denial of summary judgment under FRCP 56(c).

III. EVEN SETTING ASIDE THE PROCEDURAL AND EVIDENTIARY FLAWS DESCRIBED ABOVE, THE RECORD EVIDENCE WAS INSUFFICIENT TO PERMIT SUMMARY JUDGMENT FOR RESPONDENTS.[12]

A. Respondents May Not Evade Liability by "Passing the Buck" to the EDA.

After asserting and discarding two other explanations for Petitioner's termination (that his position was being eliminated, and that his race and behavior made him a poor employee), USC settled on a sort of "Nuremberg defense": it was not the decision-maker but was only following the EDA's orders.

There are several flaws with that approach. First, its inconsistency with USC's previous explanations, coupled with Plaintiff's *prima facie* case, is enough to deny summary judgment under *Reeves, supra; see* discussion at p. 26, ¶(f), below. Second,

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[12] The lower courts questioned whether Petitioner stated a *prima facie* case of discrimination under *McDonnell Douglas*, but analyzed the facts under the rest of the burden-shifting analysis anyway. The question of the exact nature of the *prima facie* burden of the employee-plaintiff in a "reverse" discrimination case thus was glossed over. However, under *Reeves*, that issues takes on new importance. Since a "majority" plaintiff cannot prove membership in a "minority" or typically "disadvantage" class, Petitioner instead established membership in the class that his employer disfavored, and his replacement by a member of the favored class. This Court's articulation of the precise standard -- which the Circuits have never agreed on -- would be helpful. *See also* disc'n at p. 26, ¶(f), below.

it is contradicted by other evidence (*see* discussion at subsection III. B., below).

Third, it ignores USC's influence over the EDA's decisionmaking process. In *Reeves,* this Court established that even if the decision to terminate was made by an unbiased person, a triable claim still can be stated by showing bias on the part of a supervisory employee who influenced the decisionmaker. *Reeves* gives rise to a logical "next question": how much control or influence must the biased supervisor have over the unbiased decisionmaker to be held liable?

The lower courts here felt that the question of influence was irrelevant unless Blakely absolutely had the EDA in his pocket. But that is not a correct statement of the law. In *Reeves*, the two individuals were married -- but we all know that marriage does not automatically or inevitably confer control over the other spouse! *Reeves* is better understood as concerning a working relationship, where the opinions of an influential manager were taken seriously by a corporate officer. This case fits easily into that framework: Blakely (author, university dean, Presidential appointee, serious contender in a major mayoral race) is well-respected in the economic development world, and the EDA's regional director, Smith, would quite properly pay close attention to his observations and opinions -- including his false allegations about Petitioner. In addition, while the lower courts detested the idea, the fact remains that both Smith and Blakely are African-American men who work with minority communities and are sensitive to minority concerns. It is no coincidence that Blakely told the peer reviewers, who report to Smith, that Petitioner was insensitive and unable to work with minorities; what could be better calculated to grab Smith's attention, on both personal and professional levels? The district court seems to have felt Petitioner himself was guilty of racism by even making that suggestion, but nothing is further from the truth: Petitioner is accusing Smith of sensitivity to racism, and Blakely of taking advantage of that sensitivity by publishing false, race-related criticisms about Plaintiff, to encourage Smith to acquiesce in Plaintiff's replacement. The lower courts found it preposterous to think that Blakely could have influenced the EDA, but the

question is not whether Blakely had absolute control over the EDA's decisions, just whether he had sufficient influence to retain some responsibility for Petitioner's termination.[13] *See also Hashimoto v. Dalton,* 118 F.3d 671 (9th Cir. 1997)("Lowery's dissemination of the negative job reference is an actionable employment decision"); *London v. Coopers & Lybrand,* 644 F.2d 811, 817 (9th Cir. 1981)("There is little question that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by discriminatory intent").

Finally, Blakely's and USC's discriminatory actions can be actionable even if they did not proximately result in Petitioner's termination or his inability to find a new job at USC Title VII prohibits all discriminatory "adverse employment actions," not just terminations or failures to hire. Yet in this case, once the lower courts decided (incorrectly) that discrimination played no role in Petitioner's termination, they quickly dismissed Petitioner's other claims as too minor to be actionable, because they were not enough to constitute "harassment." But "harassment" is only one subset of "adverse employment action." Blakely's racially-motivated slanders to the EDA and Shawaker were adverse employment actions even if they did not proximately lead to his firing; assigning Petitioner to a position subservient to the less-qualified man who replaced him, telling him not to talk to co-workers and trying to physically and confrontationally remove the computer equipment he needed to perform his (interim) job were adverse employment actions; the racist comments made in front of other people, and the conditioning of interim employment on a promise not to protest his discriminatory treatment (in Blakely's words, "no more of your s**t!") were adverse employment

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[13] Similarly, Blakely falsely told the Engineering School dean of personnel that Petitioner was a bad employee and had acted inappropriately to co-workers; Petitioner subsequently was rejected for every job he sought in the School of Engineering. Even if the decisionmakers in Engineering were not personally biased, Blakely nevertheless is responsible to their failure to hire Petitioner into a new job; again, holding Blakely (and therefore USC) liable on such facts, if only under a "mixed motives" theory, is entirely consistent with *Reeves*.

actions, actionable even if Respondents prevail on the termination issue itself. *Id.*

B. The Lower Courts Impermissibly Weighed Evidence, Drew Inferences and Weighed Presumptions Against Rather than For Petitioner.

It sometimes occurs that a district court or court of appeals oversteps its bounds and slips into a "factfinder" mode, deprives the jury of its proper role by weighing evidence, gauging credibility, etc. *See, e.g., Chuang v. University of California*, 225 F.3d 1115 (9th Cir. 2000); *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001)(both employment cases with facts similar to those here in which this same court of appeals chastised the district court for impermissibly weighing evidence, making inferences against the employee, and otherwise usurping the jury's role). It is entirely appropriate for the Supreme Court to remedy such errors, acting in its supervisory role, even if a larger public issue is not otherwise presented. Supreme Court Rule 10(a).

Here, the lower courts impermissibly ignored, minimized or explained away much of the evidence supporting Petitioner's position. To identify all such instances would be a voluminous undertaking, but the key misunderstandings are summarized below:

(a) The lower courts construed the peer review report as only criticizing petitioner, not his supervisor (Evans) or other, more senior USC managers. That interpretation is rebutted by the McClure declaration, Petitioner's testimony, the EDA's annual certifications, and Petitioner's performance appraisals. It also is inconsistent with the language of the peer review report itself, which never mentions Petitioner's name in any criticisms, and refers to matters that a single individual could not logically be guilty of (such as "lack of capacity" and "lacks technical assistance within WESRAC" [the next-larger Engineering unit, overseen by Evans]). In fact, the report recommends moving the Center expressly because "lack of

support at higher levels of University management hampers effectiveness of Center efforts" (emphasis added). There is no way to reconcile the courts' conclusions with this language.

(b) The courts assumed Petitioner was solely responsible for all aspects of the Center, and therefore for any failures. Yet the peer review report itself stated: "Mr. Evans provides executive management guidance and leadership to this Center. As Principal Investigator, Mr. Evans also is responsible for program policy and budget administration."

(c) The courts accepted respondents' claim that petitioner was an unproductive employee with poor interpersonal relationships, ignoring Petitioner's "outstanding" performance reviews (which even praised his relationships with the same coworkers who later accused him, but who were unwilling to face cross-examination on that issue at deposition).

(d) Both courts accepted Smith's assertion that he "would not have approved" Petitioner's retention as Director. This ignores the speculative nature of that statement, federal regulations specifying Smith did not have that authority, and the EDA's unbroken pattern of always acquiescing in USC's staffing proposals -- including approving Petitioner's continued employment, after the peer review report, in an interim position.

(e) Both lower courts found insufficient evidence of Blakely's racial bias. In doing so, they invaded the jury's province. The evidence of Blakely's racism (*see* fn. 2, above) strongly resembles the incidents described in *Chuang, supra,* 225 F.3d 1115, which affirmed the employee's right to proceed to trial on very similar facts and is a model of how this case should have been resolved.

(f) No account is taken of respondents' three, inconsistent justifications for Petitioner's termination: first that

Petitioner's position was being eliminated (it wasn't); next that his race was a "strike against him" in dealing with minorities and that he acted inappropriately (never mentioning any instruction from the EDA to fire him); and finally that EDA had told them to let him go. Pursuant to *Reeves,* Petitioner's establishment of a *prima facie* case (he was qualified, he was terminated, he was replaced with someone the same race as Blakely), plus the fact that a jury could disbelieve Respondents' explanations due to their inconsistencies with one another, warranted denying summary judgment.

(g) Petitioner submitted competent evidence rebutting all of Respondents' material allegations. They accused him of being drunk; he explained that he suffers balance problems due to surgical removal of a tumor from his ear years ago. They accused him of kissing a coworker; he noted that she had just announced her engagement, so he gave her a congratulatory hug and kiss. They accused him of making inappropriate comments to minority individuals (for example, the district court found that Petitioner had called Watts a "jungle"); yet Petitioner vehemently denied those allegations, there is no record of such problems in his personnel files or performance reviews, and Respondents produced no independent witnesses. which Petitioner vehemently denied.

(h) As to Petitioner's retaliation claims, the courts found no evidence that Engineering managers knew of his discrimination complaints when they decided not to hire him. This ignores several facts: that one of those managers had received a copy of Petitioner's EEOC complaint, and a letter from Petitioner's lawyer, before that time; that the dean in charge of personnel issues had met with Blakely, listened to Blakely's misstatements, and knew of Petitioner's concerns; and that USC never produced those managers when Petitioner noticed their depositions.

IV. CONCLUSION

Petitioner has been deprived of his right to a fair trial of his claims. The record below bulges with evidence of racist remarks and jokes made by Blakely; Blakely unquestionably gave false explanations for Petitioner's termination (*e.g.*, that he was eliminating his position); and Respondents never even tried to deny that the current Director of the Center is a less-qualified individual of the "preferred" race. This case is not even close. Can the reader imagine the reverse situation -- a Caucasian supervisor calling an African-American subordinate his "black chauffeur," telling him to bleach his skin before visiting white communities, and replacing him with a less-qualified Caucasian after falsely telling him his position was being eliminated -- winding up in this posture, with the employee losing on summary judgment?

This case presents opportunities to advance the law on issues like the applicable standard of review on motions to recuse, the contours of discrimination law when the bigot is merely influential on the decision to terminate (as in *Reeves*), and the elements needed to state a *prima facie* case of "reverse" discrimination. But this case also represents a tremendous injustice. What has happened to Petitioner, both at USC and in the judicial system, is plain wrong. This Court can fulfill its highest functions here, both advancing the development of the law and rectifying an injustice. Petitioner respectfully prays the Court grant his petition.

RESPECTFULLY SUBMITTED,

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Filed U.S. District Court: April 22.1999
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV98-2900-NM (AIJx)

ORDER RE PLAINTIFF'S EX PARTE MOTION FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY

December 15, 1997, plaintiff Eugene John Maurey filed this action against the University of Southern California and Edward Blakely for employment discrimination. The original discovery and motion cut-off dates were set for January 31, 1999, and March 22, 1999, respectively. This court granted a stipulation extending these dates to February 22, 1999, and April 12, 1999. On March 26, 1999, this court granted defendants' ex parte motion continuing the hearing on their summary judgement motion to May 17, 1999 and after defendants had filed and served their motion for summary judgment. Defendants filed their opposition to plaintiff's application April 7, 1999.

Plaintiff's seeks an extension of discovery so that he may depose A. Leonard Smith, a representative of the U.S. Economic Development Administration ("EDA"). However, by plaintiff's own admission, defendant Edward Blakely stated in his January 27, 1999 deposition that Dr. Smith expressly instructed Mr. Blakely to replace plaintiff. Pl.Mot., p.6. Plaintiff knew a full month before the extended discovery cut-off date, February 22, 1999, that he might wish to depose Dr. Smith, but failed to do so.

Plaintiff's dilatory conduct is not a reason to reopen discovery. See Conkle v. Jeong , 73 F.3d 909, 914 (9th Cir. 1995) (the district court does not abuse its discretion by denying further discovery if the movant has failed to diligently pursue discovery in the past); Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 524 (9th Cir. 1989) (failure to take advantage of additional month of discovery granted by district court showed lack of diligence). See also Hauser v. Farrell, 14 F.3d 1338, 1340-41 (9th Cir. 1994) (denial of Rule 56(f) motion proper in light of failure to depose

witness with 27 months of filing suit); 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2741 at 431 (3d ed. 1998) ([A] request for relief under [Fed.R.Civ.P.] 56(f) is extremely unlikely to succeed when the party seeking the delay has failed to take advantage of discovery.").

Plaintiff has not diligently sought discovery. He brings this request for additional discovery 15 months after filing this suit. Plaintiff did not provide defendants with a list of people he sought to depose until Friday, January 8, 1999. Def.Opp., p5. One week later, plaintiff finally noticed depositions via facsimile only a few weeks before the original discovery deadline, January 31, 1999. Id.. at p.7. On January 29, 1999, this court granted a stipulation extending the discovery deadline by a month to February 22, 1999, yet plaintiff did not take advantage of this extension. Finally, defendants, in a letter dated February 23, 1999, offered to join a in a stipulation extending all the relevant dates, provided discovery was completed prior to the date by which defendants were required to file their summary judgment motion. Def.Mot., Exhibit HH. Again, plaintiff did not take advantage of this opportunity to conduct further discovery. This court finds that plaintiff has failed to show good cause for granting his application for leave to conduct additional discovery.

Upon full consideration of the moving and opposition papers, and the authorities, the court hereby denies plaintiff's ex parte application for leave to conduct additional discovery.

IT IS SO ORDERED.

DATED: April 21, 1999

Nora M. Manella
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Cases No.: CV 98-2900-NM (AIJx) Date: May 17, 1999
Title: Maurey v. University of Southern California
Docket Entry
Present: Hon. George H. King, US DISTRICT JUDGE
Beatrice Herrera, Deputy Clerk
Attorneys Present for Plaintiff: None
Attorneys Present for Defendants: None

PROCEEDINGS: Motion to Disqualify Judge

This matter is before the court on plaintiff's motion to disqualify Judge Manella in the above-referenced case. We have carefully reviewed plaintiff's motion, memorandum of points and authorities, all attached materials, and cited authorities. We rule as follows:

I. PLAINTIFF'S ALLEGATIONS

Plaintiff moves the court to recuse Judge Manella based on her alleged significant involvement with the University of Southern California ("USC"). More specifically, plaintiff alleges that Judge Manella is or had been involved with USC's School of Law (the "Law School") in the following ways:

1) She is a member of the Board of Councilors of the Law School ("Allegation 1").
2) She donated as much as $1,999.00 to the Law School ("Allegation 2").
3) She is an alumna of the Law School. ("Allegation 3").
4) She donated her presence at a meal that was auctioned off at a Law School fundraiser for U.S.C.'s Public Interest Law Foundation ("Allegation 4").

5) She served as a guest judge at the Law School's moot court competition ("Allegation 5").

Plaintiff alleges that this involvement by Judge Manella in the Law School, which is part of U.S.C., "inappropriately entangles her" and "gives at least the appearance of bias" pursuant to 28 U.S.C. §§ 144, 455.

II. PERTINENT LAW

Section 144 requires recusal of a judge when she has "a personal bias or prejudice either against [movant] or in favor of any adverse party." 28 U.S.C. § 144. Section 455(a) requires a judge recuse herself "in any proceeding in which [her] impartiality might reasonably be questioned," i.e., when there is even the appearance of impropriety. 28 U.S.C. § 455(a).

In § 455(b), Congress specifies particular circumstances in which a judge must recuse herself, including when she serves as a fiduciary. 28 U.S.A. § 455(b)(4). "Fiduciary" is defined as including such relationships as executor, administrator, trustee, and guardian. 28 U.S.C. § 455(d)(3).

III. APPLICATION

Plaintiff argues that Judge Manella's involvement with the Law School should be treated as though it were involvement with U.S.C. However, in evaluating issues of personal bias and appearance of impropriety, we note that all of plaintiff's allegations relate to the Law School rather than to defendant U.S.C. itself. With the possible exception of Allegation 1, all of the involvement that plaintiff alleges amount to no more than ordinary involvement of an alumna with her alma mater.[14] As to Allegations 2-5, we find that they are insufficient to establish that

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[14] Indeed, this court has similar involvement with the Law School. But we are of the view that such involvement is not any basis for our recusal from entertaining this motion.

Judge Manella holds a personal bias in favor of defendant U.S.C. pursuant to 28 U.S.C.§144. Furthermore, we find that these allegations are insufficient to raise reasonable questions about her impartiality pursuant to 28 U.S.C. § 455(a).

Plaintiff argues that Allegation 1 must also be analyzed in terms of § 455(b)(4) because Judge Manella's role on the Law School's Board of Councilors amounts to that of a trustee. Plaintiff cites Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). Liljeberg concerned a judge who served as a trustee of a university and participated in trustee meetings in which extended negotiations concerning the sale of a piece of university property were discussed. 486 U.S. at 852-54. When litigation involving the property which would affect the university's financial interest came before the judge, he did not recuse himself because he did not remember the university's interest in the matter before him. See id. at 857-58. The Supreme Court held that the judge's scienter was irrelevant for analysis under § 455(a), although it would be relevant for analysis under § 455(b)(4). See id. at 860-61 & n.8.

Plaintiff argues that Liljeberg stands for the proposition that a judge who is a trustee or advisor of – or an active participant in – a university should recuse herself when that university has an interest in the outcome of the litigation before her. Liljeberg provides no support for a principle of such breadth. Moreover, plaintiff has made no allegation that Judge Manella has knowledge that her role of the Law School's Board of Councilors makes her a fiduciary with a financial interest in the lawsuit before her. Indeed, plaintiff makes no concrete allegations about the role the Law School's Board of Councilors plays in the Law School or at U.S.C. Nor does plaintiff make any allegations that Judge Manella's role on the Board of Councilors entangled her with any U.S.C., or even Law School, interests that are related to this lawsuit.

Having considered all of plaintiff's allegations n their totality, we find that they are insufficient reason to recuse Judge Manella

from this case under any of the statutes under which plaintiff brings his motion. Accordingly, plaintiff's motion to disqualify is DENIED.

IT IS SO ORDERED.
cc: Hon. Nora Manella

THIS CONST1TUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(D)
FILED U.S. DISTRICT COURT JULY 1, 1999
ENTERED U.S. DISTRICT COURT JULY2, 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV98-2900 NM (AIJx)

ORDER RE DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,
SUMMARY ADJUDICATION

I
INTRODUCTION

On December 15, 1997, Eugene John Maurey filed this action against the University of Southern California ("U.S.C."), Edward J. BLAKELY, and Does 1 through 50 inclusive for: 1) discrimination and harassment under Title VII, 42 U.S.C. §2000e; 2) discrimination and harassment under the Fair Employment and Housing Act (FEHA) Gov. Code, §12940 et seq.; 3) retaliation under Title VII; 4) retaliation under FEHA; 5) violations of 42 U.S.C. §§ 1981and 2000d[15]; 6) breach of contract; 7) breach of

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[15] 42 U.S.C. § 2000(d) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."Plaintiff concedes that he cannot maintain this claim. PI. Opp. Mot, p. 15.

42 U.S.C. §1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

covenant of good faith and fair dealing; 8) tortious interference with contract and prospective economic advantage by Blakely; and 9) tortious termination/refusal to hire in violation of public policy, FEHA Gov. Code, §12940 et.seq.

On November 20, 1998, defendants filed a Motion for Judgment on the Pleadings, which was heard by Judge Margaret M. Morrow January 4, 1999. Judge Morrow granted in part and denied in part defendants' motion. Following Judge Morrow's January 8, 1999 order, eight claims remain: 1)Discrimination and Harassment (Title VII); 2) Discrimination and Harassment (FEHA); 3) Retaliation (Title VII); 4) Retaliation (FEHA); 5) Discrimination (42 U.S.C. §§1981 & 2000(d); 6) Breach of Contract; (9) Tortious Termination/Refusal to Hire; and 10) Public Policy Violation (disability discrimination).[16] U.S.C. is a named defendant in all eight claims. Blakely is named in the second, fourth, fifth, ninth, and tenth claims. However, Judge Morrow ruled that Blakely cannot be held individually liable for discrimination, or any alleged improper termination or hiring, under any theory.

On March 26, 1999, defendants filed the instant Motion for Summary Judgment on all remaining claims. On March 30, 1999, plaintiff filed his Opposition, and defendants filed their Reply May 10, 1999. On April 4, 1999, plaintiff filed an ex parte application for leave to conduct additional discovery, which was denied by this court April 20, 1999. On April 3D, 1999, this court issued an order advising plaintiff that he could not introduce new documents or statements to oppose defendants' motion for summary judgment)[17]

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[16] On December 22, 1998, plaintiff filed a First Amended Complaint adding this tenth claim for disability discrimination.

[17] On May 4, 1999, this court issued a minute order advising the parties that Judge Manella is a member of the Board of Councillors of the USC Law School and instructing the parties that any motion to recuse must be filed by May 7, 1999. On May 17, 1999, Judge King denied plaintiff's motion to recuse Judge Manella. On June 4, 1999, the Ninth Circuit denied plaintiff's application for writ of mandamus seeking review of Judge King's order.

In their instant motion defendants contend: 1) plaintiff's reverse race discrimination claims fail because plaintiff has not established a prima facie case and cannot establish pretext[18];2) plaintiff's retaliation claims fail for the same two reasons[19]; 3) plaintiff's race harassment claim fails because it is time-barred, and the purported conduct does not meet the threshold required to state a claim for race-based hostile-environment harassment[20]; 4) plaintiffs contract claim fails because the employment relationship was terminable at will;[21] and 5) plaintiff's disability claim is time-barred, and plaintiff fails to establish a prima facie case of discrimination.[22]

Upon full consideration of the moving, opposition, and reply papers, the parties' arguments and authorities, and the entire record herein, the court grants defendants' motion for summary judgment on the grounds that there are no triable issues of material fact as to any of plaintiffs claims. Defendants' are entitled to summary adjudication as a matter of law as to each of plaintiffs claims.

II

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[18] Relevant to plaintiffs first claim for Title VII race discrimination; second claim for FEHA race discrimination; fifth claim for discrimination under 42 U.S.C. §§1981 & 2000(d); sixth claim for breach of contract; and ninth claim for tortious termination/refusal to hire.

[19] Relevant to plaintiff's third claim for Title VII retaliation; fourth claim for FEHA retaliation; sixth claim for breach of contract, ninth claim for tortious termination/refusal to hire; and tenth claim for Public Policy Violation (disability discrimination).

[20] Relevant to plaintiff's first claim for Title VII harassment; second claim for FEHA harassment; and ninth claim for tortious termination/refusal to hire

[21] Relevant to plaintiffs sixth claim for breach of contract.

[22] Relevant to plaintiffs tenth claim for Public Policy Violation (disability discrimination).

RELEVANT FACTUAL BACKGROUND

Eugene John Maurey, a Caucasian male, worked for U.S.C. from 1988 to 1997. Plaintiffs Opposition Motion ("Pl.Opp."), p.1. Between 1988 and 1992, Maurey worked in the U.S.C. School of Engineering, administering a technology transfer and trade assistance program. Id. He has a B.S. in Engineering from the University of Illinois, an MBA from the University of Chicago in finance and marketing, and a certificate in management from the Professional Management Program of the University of Southern California. Id. Maurey has been a business owner and worked in industries ranging from small manufacturing concerns to aerospace companies. Id.; Defendants' Motion for Summary Judgment ("Def. Mot."), Declaration of Kelley L. Sbarbaro ("Sbarbaro Dec."), Exh.87, Maurey resume. In 1980, Maurey had surgery to remove a tumor. As a result of this surgery, he lost all hearing in one ear, and one side of his face was partially paralyzed. Def. Mot., Sbarbaro Dec., Exhibit Q, Declaration of John Maurey. In addition, Maurey has suffered nerve damage which sometimes causes his speech to slur and occasionally interferes with the balance center in his deaf ear, causing him to appear unsteady or drunk. PI. Opp., p. 22. Plaintiff also has a diagnosed sleep disorder for which he receives treatment. Id.

On July I, 1992, an agency of the United States Government, the Economic Development Agency ("EDA") provided funding to create a University Center for Economic Development at U.S.C.'s School of Engineering. Def. Mot., p. 5. The Center was to be the first such center located at a private university. PI. Opp., p. 5. The EDA approved Maurey as Director of this new Center, and he remained the director for four years until the Center closed in the summer of 1996. Def. Mot., p. 5. When Maurey accepted the directorship, he signed a U.S.C. application for employment identifying himself as the Program Director for the EDA-funded Center for Economic Development. Def. Mot., Sbarbaro Dec., Exh. 38. The application, signed and dated June 16, 1992 by Maurey, states in section 4: "In consideration of my employment, I. .. agree that my employment and compensation can be

terminated at-will, with or without cause, at any time, either at my option or at the option of US C." Id., p.3.

The Center was organized as a one-man program, and Maurey was the Center's only employee. Def. Mot., p. 5; Def. Mot., Sbarbaro Dec., Exh. 32, National Association of Management and Technical Assistance Centers Peer Review Report ("Peer Review"). On June 30, 1996, the EDA decided not to renew funding for the Center. Defendants' Separate Statement of Undisputed Facts ("UF"), ¶A7. However, the EDA did decide to fund a new center for economic development in U.S.C.'s School of Urban & Regional Planning under the leadership of Dean Edward J. Blakely Id. ¶ A8.

Early in 1996, the EDA selected Maurey's program to be evaluated by a three-member team of university center directors. Def. Mot., p. 6. Prior to the team's visit to U.S.C., they contacted Betty Atkinson, Planning Chief of the Seattle Regional Office of the EDA. Def. Mot., Sbarbaro Dec., Exh. 32, Peer Review. The Seattle Office of the EDA had concerns about the overall performance of the U.S.C. Center. Id. The review team included EDA center directors
from the University of Oklahoma, the University of Illinois, and Western Carolina University. Id. The team met with Maurey and George Evans, Executive Director of the Western Research Application Center (WESRAC).[23] In addition, the team met with two community development organizations served by the Center, the Associate Dean of U.S.C.'s School of Engineering, and key

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[23] WESRAC is a department of USC's School of Engineering. Def. Mot., Sbarbaro Dec., Exh. 32, Peer Review. Evans acted as the principal investigator for the Center run by Maurey. He provided some guidance and USC administrative interface to the Center. Evans allocated 10% of his time to the Center at no charge to the EDA contract. Id.

The team was originally scheduled to meet with Maurey and Evans January 29-30. However, Maurey canceled the peer review on short notice, resulting in a reprimand from Evans. Def. Mot., Sbarbaro Dec., Exh. 33, Letter from Evans to Maurey. In his letter, Evans noted that Maurey had canceled the peer review, claiming he had to be out of town on urgent family business, but later admitted this was a fabrication. Id.

Regional EDA personnel. Id.

The peer review was highly critical of the Center's performance. Id. The report lists the following weakness for the Center: 1) no strategic plan with relation to programs and funding, no long-term vision, no attainment of new goals/objectives/ work plans; 2) lack of capacity to provide meaningful technical assistance through the Center's resources; 3) no understanding of the purpose of the EDA University Center Program; 4) lack of focused, diversified advisory committee; 5) a fractious approach to community and economic development; 6) failure to articulate meaningful assistance to claimed clients; 7) Center serves the needs of U.S.C. rather than the community; and 8) the Center lacks technical assistance within WESRAC. Id. Although the team recognized that WESRAC was an outstanding organization, it found that EDA's University Center Program had "fallen short of EDA program requirements." Id. The team concluded that program achievements were less than would have been expected from the funds invested, the staffing available, and the length of time (four years) the Center had been operational. Id.

Although a draft of the peer review was faxed to Maurey April 10, 1996, and a formal response to the many criticisms requested by May 10, Maurey neither responded, nor remembers bringing the review to the attention of George Evans. Def. Mot., p. 7. Evans received the peer review in May. Thereafter, he and Maurey made a proposal to the EDA to keep the Center in the School of Engineering. Id. The EDA rejected this proposal and decided not to renew funding for the Center, which expired June 3D, 1996. Id. However, the EDA provided U.S.C. with a new grant to create a center in the School of Urban & Regional Planning, under the leadership of its dean, Edward Blakely. Id.

A. Leonard Smith, the Regional Director for the EDA located in Seattle, Washington is responsible for overseeing EDA-funded University Center Programs in the Western Region. Declaration of A. Leonard Smith ("Smith Dec."),¶ 2. Smith invited Blakely to apply for a new grant from the EDA. Id., ¶4. Smith also told Blakely to put together a fresh team, under Blakely's personal leadership, and to staff the new center at the School of Urban and

Regional Planning. Smith explained that the program should serve highly distressed, economically disadvantaged communities. Id.,¶ 5. Smith had final approval over University Center staff and would not have approved the reappointment of John Maurey as Director for the EDA-funded University Center, because of the poor performance of the program under his directorship. Id., ¶6; Def. Mot., Sbarbaro Dec., Exh. 32, Peer Review.

Maurey requested that Blakely provide funding for him to continue working in a temporary position at the new center, which Blakely did. Def. Mot., p. 8. From June 30, 1996 to February 24, 1997, Maurey was employed in this temporary position. Def. Mot., Sbarbaro Dec., Exh. Q, Declaration of John Maurey dated October 30, 1998,¶ 3. However, Maurey never asked Blakely to hire him as Director of the new center. Def. Mot., p. 7.

Before he was fired from the directorship in June 1996, Maurey began looking for other 2 jobs at U.S.C. Def. Mot., Sbarbaro Dec., Exhs. 38, 82, 87. On April 18, 1996, Maurey sent a letter and his resume to Blakely requesting help in finding another job. Def. Mot., Sbarbaro Dec., Exh. 87. Although Maurey applied for over 20 jobs at U.S.C. from June 16 to August 20, 1996, he was not hired for any of them. Def. Mot., Sbarbaro Dec., Exh. 62.,Five months after being notified of his layoff from the School of Engineering, Maurey verbally complained to U.S.C.'s Affirmative Action Office, and then filed a written complaint with the office. Id. The written internal complaint, dated November 14, 1996, alleges that Maurey was discriminated against based on his age (then 44) , disability (impaired hearing), and race (white). Def. Mot., p. 8; Sbarbaro Dec., Exh. 12. The basis for the complaint was a comment allegedly made by Blakely to David Shawaker, Senior Executive Director of Administrative Services for the Information Services Division, and then relayed by Shawaker to Evans, and thereafter to Maurey. Id.; Shawaker Deposition, p. 4. The alleged comment was: "John Maurey has two strikes against him in economic development. First, he has no educational credentials, second he's not black or Hispanic." Def. Mot., Sbarbaro Dec., Exh. 12. The meeting between Shawaker and Blakely took place July 9, 1996. Def. Reply, p. 5.

In a letter dated March 25, 1997, responding to Maurey's internal U.S.C. complaint, Blakely noted that the purpose of his meeting with Shawaker had been to discuss the pending transfer of the EDA-funded center from the School of Engineering to the School of Urban Planning and Development. PI. Opp., Bellows Dec., Exh. 19. During the course of the meeting, Blakely and Shawaker discussed Maurey. Id. Blakely told Shawaker that he had received one formal and several informal complaints regarding Maurey's performance as director. Id. These complaints included: 1) that Maurey knew little or nothing about economic development; 2) that Maurey was unable to relate to Black and Hispanic community organizations, and 3) that Maurey had made a female staff member uncomfortable.[24] Id.

Shawaker also responded to Maurey's internal U.S.C. complaint in a letter dated March 7, 1997. PI. Opp., Bellows Dec., Exh. 20. With regard to Blakely's comment concerning Maurey's race, Shawaker noted, "I expressed the view to George [Evans] that Dean Blakely was making a dispassionate observation about the community, which still harbors some racial bias, rather than expressing a racist bias in himself." Id.

In late January 1997, Maurey applied for a project manager position at U.S.C.'s Regional Technology Transfer Center ("RTTC"). Def. Mot., Dozier Dec., Associate Director of the Western Research Application Center, were the decision makers for this job selection, and they ultimately hired Donald Fullenwider for the position. Id., ¶4; Suckow Dec.,¶4. Fullenwider had strong credentials that suited their needs. Dozier Dec., ¶4. He had an undergraduate degree in Architecture from the University of Houston, and both an M.A. in Architecture and an MBA from UCLA. PI. Opp., Bellows Dec., Exh. 42. Fullenwider's

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[24] A formal complaint was sent to Blakely March 28, 1997 by Alison Covert. PI. Opp., Bellows Dec., Exh. 33. At a meeting for USC employees involved in the Capacity Building Training Program, Covert had introduced herself to Maurey as a facilitator of the Capacity Building Program. Bill Davis another USC employee walked into their conversation at which time Maurey said, "I know how you got the job, you had to sleep with Bill." Id.

background in architecture made him compatible with the RTTC's incubator/research park charter. Dozier Dec., ¶ 4. Dozier also found that Fullenwider's computer expertise would aid the RTTC's effort to focus on information technology. Id.

A second RTTC Project Manager position became available in July 1997, for which Maurey also applied. Dozier Dec.,¶5.Dozier hired Charles Wilcox for this position. Wilcox had 39 years of experience at Hughes Aircraft including a period managing internal research and development, had been a professor of engineering at U.S.C. and UCLA, and was a pioneer in the field of technology transfer. Id. Wilcox had an undergraduate degree from Duke University, a Master's from the University of Illinois, and a Ph.D. from U.S.C. Def. Mot., Wilcox Dec., p. 39. Charles Wilcox, like Maurey, was deaf in one ear. Id.

Dozier did not hire Maurey for either of these two positions because a number of people from the RTTC, including Carolyn Suckow, approached him regarding Maurey's work history at U.S.C. Dozier Dec., ¶3. The reasons given for not recommending Maurey were his poor work ethic, the fact that he had lost an EDA grant due to poor performance, and his unprofessional behavior. Id. In particular, Carolyn Suckow recommended not hiring Maurey because he frequently fell asleep at his desk, made comments containing sexual innuendo, appeared drunk at a reception attended by key economic development players, and on one occasion hugged and kissed Ms. Suckow at work."[25] Suckow Dec.,¶2-3. On March 20,1997 and October 6,1997, Maurey was advised that he had been denied the first and second RTTC Project Manager positions, respectively. Def. UF, ¶E2-E3.

In February 1997, Maurey filed a discrimination complaint with the EEOC. Def. Mot., Sbarbaro Dec., Exh. 13. In his first

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[25] Not long after Carolyn Suckow began working as Associate Director of the Western Research Application Center ("WESRAC"), Maurey hugged and kissed Ms. Suckow while at work. Maurey Deposition, p. 261. The next day Ms. Suckow confronted Maurey and told him she was very displeased that he had acted so unprofessionally. Id.

EEOC complaint, Maurey alleged that he had been laid off because he was white, and in retaliation for opposing racial discrimination. Id. On April 22, 1997, and November 13,1997, Maurey filed his second and third EEOC complaints, alleging he was not hired for the two RTTC Project Manager positions to which he had applied, in retaliation for his prior EEOC complaints. Id., Exhs. 14, 15.[26]

At his deposition, Maurey testified that in 1994, he heard Blakely make a reference to "my people." Maurey Deposition, p. 289-290. Maurey also testified that in 1995, he heard his co-worker, Len Mitchell, make a statement to the effect, "Gee, it's kind of nice to have a white chauffeur," to which Maurey testified he responded, "Am I missing something here?" Id., p. 163-164. Maurey also testified that in response, Blakely stated: "You must have been asleep during the revolution." Id.

On December 15, 1997, Maurey filed this action alleging reverse race discrimination, harassment, retaliation, and breach of contract. Def. Mot., p. 9. In addition, he filed an amended complaint October 30, 1998 adding a claim of disability discrimination. Id.

VI
DISCUSSION

A
Applicable Standards

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[26] Although Maurey's initial USC internal complaint alleged that he was discriminated against on the basis of race, age, and disability, m., his hearing impairment, he failed to raise the age or disability claims in any of his three EEOC complaints. Nor did he allege racial "harassment" either in his internal USC complaint, or in any of his three EEOC complaints. Def. Mot., Sbarbaro Dec., Exhs. 12,13, 14, 15.

Summary judgement standard

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corporation v Catrett, 477 U.S.317,327,106 S.Ct. 2548, 2555 (1986)(quoting Fed. R. Civ. P. I). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

In a trilogy of 1986 cases, the Supreme Court clarified the applicable standards for summary judgment. See Celotex. supra; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Matsushita Electrical Industry Co. v Zenith Radio Corp ,475 U.S. 574,106 S.Ct. 1348 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Anderson, 477 U.S. at 256,106 S.Ct. at 2514. The governing substantive law dictates whether a fact is material; if the fact may affect the outcome, it is material. Id. at 248, 2510. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, it must satisfy its burden with affirmative, admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence submitted by the non-moving party. The moving party need not disprove the other party's case. See Celotex, 477 U.S. at 325, 106 S.Ct.at 2554.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

When assessing whether the non-moving party has raised a

genuine issue, the court must believe the evidence and draw all justifiable inferences in the non-movant's favor. Anderson 477 U.S. at 255, 106 S.Ct. at 2513 (citing Addaxes v. S.E. Kress and Company, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient to create a genuine issue of material fact. Id. at 252, 2512. As the Supreme Court explained in Matsushita,

> [w]hen the moving party has carried its burden under Rule 56(c), Its opponent must do more than simply show that there is some metaphysical doubt as to the material facts where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial.

Id., 475 U.S. at 586-87,106 S.Ct. at 1356 (citations omitted).

To be admissible for purposes of summary judgment, declarations or affidavits must be based on personal knowledge, must set forth "such facts as would be admissible in evidence," and must show that the declarant or affiant is competent to testify concerning the facts at issue. Fed. R. Civ. P. 56(e). Declarations on information and belief are insufficient to establish a factual dispute for purposes of summary judgment. Taylor v List,880 F.2d 1040, 104f5 (9th Cir. 1989).

B

Application

Defendants contend: I) plaintiff's reverse race discrimination claims fail because plaintiff has not established a prima facie case and cannot establish pretext; 2) plaintiff's retaliation claims fail for the same two reasons; 3) plaintiff's race harassment claim fails because it is time barred, and the purported conduct does not meet the threshold required to state a claim for hostile-environment race harassment; 4) plaintiff's contract claim fails because the

employment relationship was terminable at will; and 5) plaintiffs disability claim is time-barred, and plaintiff fails to establish a prima facie case of discrimination.

1. Reverse Race Discrimination

Plaintiff concedes that he cannot sustain a claim under 42 U.S.C. §2000d but argues that he has established a prima facie case of race discrimination. PI. Opp., p. 15. Plaintiff contends that "[a] colored supervisor [Blakely] elected not to continue his employment, made several racist remarks, and explained that plaintiff's race was a 'strike against him.'" PI. Opp., p. 17. In addition, plaintiff argues that he was qualified to be the director of the new center established in the School of Urban and Regional Planning.[27] Id. Plaintiff further alleges that EDA funding did not lapse, because there still is a USC Center for Economic Development, and the creation of a new center would require approval by the Assistant Secretary of the Department of Commerce. Id. Finally, plaintiff contends that Smith, the EDA Regional Director, was not the actual decision maker concerning Maurey's employment[28] Id., p. 17-18. Plaintiff also notes that Smith, like Blakely, is African-American, and therefore, necessarily sympathetic towards Blakely. Id.,p. 18.

Defendants argue that 1) Maurey cannot establish a prima facie case of discrimination because the grant sponsor, the EDA, concluded his performance was not satisfactory; and 2)Maurey has no evidence of pretext because he cannot dispute that: a) his salary

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[27] In support of this assertion, plaintiff offers his job evaluations from 1989, 1990, and 1992 - 96. All but one are completed by George Evans and are favorable. PI. Opp., Bellows Dec., Exhs. 1-8.

[28] 14 Plaintiff offers no evidence to support his assertions that a new center would require approval from the Assistant Secretary of Commerce or that Smith did not have final approval over hiring the director at an EDA-funded center. Plaintiff cites nothing for his first assertion, and cites Exhibit 48 for his second. However, this document does not discuss the regional director's staffing authority.

was paid from the EDA grant; b) because of the program's poor performance, the EDA did not renew the grant, resulting in Maurey's layoff; and c) the EDA Regional Director wanted a new team, funded by a new grant, located at a new school, to be assembled under Blakely's leadership. Reply, p. 2 -3.

In order to make out a disparate treatment claim, a plaintiff must prove that he or she was intentionally treated less favorably because of race, color, religion, sex or national origin. See US Postal Service Bd of Governors v Aikens, 460 U.S. 711, 715 (1983). In a Title VII race discrimination action, the court should employ the three-step burden-shifting analysis established by the Supreme Court in McDonnell Douglas v Green, 411 U.S. 792, 802 (1973). Although the court employs this burden-shifting analysis, the burden of persuasion always remains with the plaintiff. Jauregui v City of Glendale, 852 F.2d 1128,1134 (9th Cir. 1988). Therefore, to make out a claim of racial discrimination under Title VII, plaintiff must first prove a prima facie case of race discrimination. Once the plaintiff meets this burden, the burden of production shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for its actions. Washington v Garrett, 10 F.3d 1421, 1433 (9th Cir. 1994). Plaintiff must then produce evidence which raises a genuine factual issue as to whether defendant's reasons are merely a pretext for racial discrimination. Id. If plaintiffs evidence is lacking, summary judgment is proper for defendant. Wallis v J R Simplot Co, 26 F.3d 885, 890-91 (9th Cir. 1994).

To show pretext, and survive summary judgment, plaintiff must produce enough evidence to allow a reasonable factfinder to conclude either that the employer's non-discriminatory reason for the discharge is false, or that the true reason for the discharge was discriminatory. See Nidds v Schindler Elevator Corp. 113 F.3d 912, 918 (9th Cir. 1997); Warren v City of Carlsbad , 58 F.3d 439, 443 (9th Cir. 1995) (plaintiff must produce evidence of facts showing discriminatory motive or demonstrate that the employer's non-discriminatory explanation is not credible).

To establish a prima facie case of disparate treatment, the plaintiff must offer evidence that "give[s] rise to an inference of

unlawful discrimination." Texas Dept of Community Affairs v Burdine, 450 U.S. 248, 253 (1981). Proof of discriminatory intent may be direct, circumstantial or inferred from statistical evidence, and all evidence that the plaintiff presents can contribute to the inference in a cumulative manner. See Stender v Lucky Stores, 803 F. Supp. 259,319 (N.D. Cal. 1992). Direct evidence of discriminatory intent is, by itself, sufficient to establish a prima facie case of impermissible discrimination. See Palmer v United States, 794 F.2d 534, 537 n.1 (9th Cir. 1986).

To make out a prima facie case of intentional discrimination based on indirect or circumstantial evidence, the plaintiff bears the initial burden of showing that (1) he is a member of a protected class; (2) he was qualified for the position in question; (3) he was denied the position despite his qualifications; and (4) the position continued to exist, or a similarly situated employee was hired or promoted into the position. See McDonnell Douglas, 411 U.S. at 802.

Here, plaintiff fails to establish the second and third prongs of a prima facie case of race discrimination, i.e., that he was qualified to be director of the new center and that he was denied the position despite his qualifications. The Peer Review Report conducted in early 1996 by three directors of similar EDA-funded University Centers was highly critical of Maurey's four-year tenure as director of the old Center. Def. Mot., Sbarbaro Dec. Exh. 32. Although the report did not name plaintiff personally, it did identify program weaknesses generally attributable to a director, such as the absence of a strategic plan, the absence of a long-term vision, the absence of a funding plan, and the absence of a diversified advisory committee.[29] In addition, the peer report identified the Center as a "one-man program" and concluded that the Center had "fallen short of EDA program requirements." This poor evaluation of the Center under Maurey's direction was the basis for the Regional Director's decision not to renew funding for

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[29] When Blakely suggested Maurey go to Watts to establish an advisory board, plaintiff responded, "I don't go down to that jungle." Def. Mot. p. 6, fn. 5.

the Center. Regional Director Smith had final approval over University Center staff hiring and would not have approved the reappointment of John Maurey as Director of the EDA-funded University Center because of the performance of the program under his directorship, as reflected in the Peer Review Report. It is irrelevant whether the new center is a continuation of the old center. The facts are undisputed that Maurey was laid off because the EDA determined that under his directorship, the center failed to meet program requirements.

Even if Maurey were able to establish a prima facie case of race discrimination, defendants have presented evidence of a legitimate, nondiscriminatory reason for not hiring him for a new position after funding for his old position lapsed - namely, his poor performance. Maurey offers no evidence that this reason is pretextual or that the true reason he was not rehired in another capacity is anti-white animus. Maurey offers merely his own allegations and theories regarding Blakely's motives, based on a conversation between Dean Blakely and Mr. Shawaker that occurred after Maurey had been terminated.[30] However, these assertions of discriminatory motive and intent are inadequate, given the evidence of a legitimate, non discriminatory reason for not re-hiring Maurey. The Peer Review Report was conducted by competent professionals who were affiliated neither with Blakely nor with USC. Maurey produces no evidence showing the defendants "cooked up" the report in order to fire him. In fact, Maurey does not attack the credibility of the Peer Report at all, and presents no evidence from which a reasonable factfinder could conclude that the true reason Maurey was not re-hired was anti-white animus. This court finds that Maurey has failed to establish a prima facie case of race

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[30] Plaintiff states that "Blakely has a long history of behavior suggesting racial bias." Pl. Opp., p. 9. As evidence that "Blakely's viewpoint is not completely color-blind," plaintiff cites his past membership in the Southern Christian Leadership Conference, and the fact the Blakely has been recognized by the NAACP and the Association of Black Builders and Contractors. Id.

discrimination and therefore, grants defendants' motion for summary adjudication on plaintiff's first and second claims for race discrimination in violation of Title VII and the FEHA.

2. Retaliation

Plaintiff asserts that he has established a prima facie case of retaliation in connection with two RTTC positions for which he was not hired. PI. Opp., p. 20.[31] He refers to two facts which allegedly establish a causal connection between Blakely and the decision makers, Suckow and Dozier, who declined to hire him for two RTTC positions: I) USC's Affirmative Action office sent copies of the EEOC complaint to Blakely, Evans, and Shawaker, and 2) "it is customary for USC managers to share information about grievants, and to avoid hiring them." PI. Opp., p. 21. In addition, plaintiff argues that he has demonstrated a triable issue as to the falsity of defendants' explanation for not hiring him: 1) "USC's written policy mandated that plaintiff be hired for the job if he was credible because even though she "claims she was still upset over a hug and a peck on the cheek years earlier. . . she subsequently invited plaintiff to her wedding;" 3) defendants' allegations that Maurey was unsuccessful as the Center director are refuted by his performance evaluations; 4) there are no written complaints in plaintiff's file concerning inappropriate behavior towards women; 5) Maurey was not inappropriately drunk, but may have appeared so due to his disability; 6) although plaintiff has fallen asleep on the job, he has a diagnosed sleep disorder; and 7) "USC itself deemed plaintiff qualified for the positions at issue, because the Employment Office screens all applicants." Id., pp. 22-23. Plaintiff has failed to establish a prima facie case of retaliation, because he presents no evidence linking his complaints

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[31] Maurey has apparently conceded his retaliation claim for other jobs he sought but was not hired for, as his opposition discusses only the two RTTC positions. In any event, there is no evidence to support such a claim.

to his failure to find a job at USC. Moreover, plaintiff fails to raise a triable issue as to whether Suckow's and Dozier's stated reasons for not hiring him were pretexual.

Title VII prohibits retaliation against an employee for opposing any practice made unlawful by Title VII. 42 U.S.C. S 2000e-3(a). The order and allocation of proof is similar to that of disparate treatment analysis. To prove a prima facie case of unlawful retaliation, a plaintiff must establish that (1) he engaged in a protected activity, (2) he suffered an adverse employment action, and (3) a causal link exists between the two events. Trent v Valley Electric Assn., 41 F.3d 524, 525 (9th Cir. 1994). If he meets this burden and establishes a prima facie case, the burden of production shifts to defendants to articulate a legitimate, non-discriminatory reason for the termination. Miller v Fairchild Industries, 797 F.2d 727, 730 (9th Cir. 1986). If defendants are successful, plaintiff has the ultimate burden to rebut by showing that the proffered explanation is a mere pretext, and that unlawful retaliation is the real reason behind the termination. St Mary's Honor Center v Hicks, 509 U.S. 502 (1993). Plaintiff must produce "specific, substantial evidence of pretext." Steckl v Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983).

Absent direct evidence of retaliation, -- the third element of a retaliation claim -- a causal link may be established by showing that the adverse employment decision occurred proximate in time to the protected activity, and that the person who made the adverse employment decision knew of the protected activity. Miller v Fairchild Industries, Inc., 797 F.2d at 731-32 (9th Cir. 1986) (evidence that managers who participated in EEOC negotiations were responsible for layoff and layoff occurred less than two months after negotiation sufficient to establish prima facie case); see also Payne v. Norwest Corp.113 F.3d 1079,1079 (9th Cir. 1997)(timing of termination creates an inference of causation, where plaintiff filed complaint with human rights commission January 31 and was fired February 9; triable issue of fact concerning whether employer's stated reason for discharge

was pretextual precluded summary judgment).

In Tarin v County of Los Angeles, 123 F.3d 1259, 1265 (9th Cir. 1997) (Fletcher, J.), the Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the employer with respect to an employee's retaliation claim. Although the Court held that the employer had discriminated against Tarin for her military service, it affirmed summary judgment on Tarin's claim of racial discrimination and retaliation. Id. at 1264-65. The Court held that Tarin failed to show a causal link between the protected activity, filing administrative complaints, and the adverse employment action. Id. at 1265. Tarin alleged that her employer, the County, retaliated against her by denying her an opportunity to re-interview for a promotion and denying her promotional opportunities. The Ninth Circuit found that Tarin presented no evidence that defendants deliberately tried to avoid re-interviewing her because of her protected activities, and that Tarin presented no evidence linking the County's decision not to promote Tarin to her filing an administrative complaint.

Here, as in Tarin, Maurey fails to establish a causal link between filing the internal USC and EEOC complaints and his failure to receive offers for the two RTTC positions. Maurey adduces no evidence that either Dozier or Suckow ever received copies of the complaints or that they even knew of the complaints.[32] Plaintiff shows no connection between Blakely at the School of Urban and Regional Planning and the decision makers for the RTTC position, Dozier and Suckow. Accordingly, he fails to show a connection between his complaints about Blakely and his failure to be hired for either RTTC position. Even if Shawaker, Evans, and Blakely received Maurey's EEOC complaints, this fact fails to establish a connection between Suckow and Dozier on the one hand, and Blakely on the other. Finally, Maurey offers no evidence to suggest that Suckow and Dozier would retaliate

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[32] As noted above, pp. 7-9, Maurey filed the following complaints: I) an internal USC written complaint on November 14,1996; 2) an EEOC complaint on February 10, 1997; 3) an EEOC complaint on April 22, 1997, and 4) an EEOC complaint on November 13, 1997.

against Maurey on Blakely's behalf. Maurey's conclusory allegation that it is customary for USC managers to share information about grievants and not hire them is wholly unsupported. In short, because Maurey cannot establish the third prong of a prima facie claim for retaliation, i.e., a causal link, his claim fails.

Moreover, Maurey fails to allege any facts that would raise a triable issue as to pretext. Maurey cannot dispute that the decision makers were told Maurey had lost the grant funding his salary due to the poor performance of the Center under his directorship, and that he was someone with whom people did not want to work. Maurey Deposition, pp. 88-89, 229, 614-616, and 617620. Although Maurey's opposition contests Dozier's and Suckow's perceptions of his qualifications, these arguments are irrelevant so long as the assessments made by Dozier and Suckow were made in good faith."[33] In addition, Maurey's performance evaluations, prepared by George Evans, are irrelevant. Evans was not a decision maker for either of the RTTC positions, nor did Dozier or Suckow rely on Evans' advice to select from the pool of applicants. Maurey presents no evidence from which a reasonable trier of fact could conclude Dozier and Suckow were not acting in good faith when they decided not to hire Maurey.

In addition, Maurey offers no evidence establishing that Dozier and Suckow did not have a good faith belief that Fullenwider and Wilcox were the best qualified candidates for the two RTTC jobs. Both candidates had multiple graduate degrees and work experience directly related to the RTTC Project Manager job functions as identified in Dozier's deposition. Maurey's assertion that he could also be an RTTC project manager does not negate the fact that the candidates hired for the jobs were very well qualified and were believed, by Dozier and Suckow, to be better qualified than Maurey. Finally, whether Maurey was qualified is irrelevant. USC policies do not guarantee that Maurey

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[33] Plaintiff himself testified he believed Suckow was still mad at him for engaging in inappropriate behavior with her. Such behavior is not a protected activity. See Def. Mot., p. 17.

will be hired for any job for which he may be qualified. USC is entitled to make its own determination as to who is most qualified, so long as it does not do so for unlawful reasons. This court finds that Maurey has failed to establish a prima facie claim of retaliation and therefore grants defendants' motion for summary adjudication on plaintiffs third, fourth, and ninth claims for retaliation and tortious termination/refusal to hire in violation of Title VII and the FEHA.

3. Racial Harassment

Plaintiff contends that Blakely made numerous racially biased remarks to him while Maurey served in his interim position, less than 300 days before he filed his first EEOC claim February 10, 1997. PI. Opp., p. 23. To the extent these alleged remarks were not disclosed in discovery, they will not be considered by the court.[34]

Plaintiffs cognizable claim for harassment is based on two comments, one made in 1994 when Blakely made a reference to "my people," and the second made in 1995 in which Len Mitchell, a co-worker, remarked, "Gee, it's kind of nice to have a white chauffeur," to which Maurey testified he responded, "Am I

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[34] On April 20, 1999, this court denied plaintiffs request to conduct additional discovery, finding "[p]laintiffs dilatory conduct is not a reason to reopen discovery." April 20, 1999 Order, p.2.

On April 30, 1999, this court issued an order advising plaintiff that he could not introduce new documents or statements to oppose defendants' motion for summary judgment. "Nothing other than documents already produced by the parties and deposition answers provided by witnesses in this case may be used by plaintiff to oppose defendants' motion for summary judgment." April 30, 1999 Order, p. 16. In violation of the court's order, plaintiffs opposition papers sought to rely on statements never produced in discovery. In addition, minutes before the hearing on the summary judgment motion, plaintiffs counsel attempted to submit a faxed declaration from an individual who had advised counsel that the declaration had been faxed by his secretary without his authorization. Finally, after plaintiff himself had twice declared, under oath, that certain tape recordings did not exist, his counsel attempted to introduce parts of the tapes into evidence, following their eleventh-hour appearance. Plaintiffs counsel's conduct falls well below the standards expected of attorneys practicing in the Central District of California.

missing something, here?" Maurey also testified that Blakely responded: "You must have been asleep during the revolution." Def. UF, C ¶¶ 1-3. Plaintiff argues that these comments were severe and pervasive enough to cause a reasonable person to feel he was in a hostile environment. PI. Opp., p. 25.

Defendants respond, first, by arguing that Maurey's claim for harassment is time-barred.[35] Second, defendants argue that the two comments overheard by Maurey several years ago do not come close to being severe or pervasive. These remarks neither "permeated" the workplace nor created an objectively hostile work environment. Accordingly, defendants contend, Maurey's harassment claim fails as a matter of law.

Racial harassment in violation of Title VII requires that plaintiff establish the existence of a hostile work environment that is "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Harris v Forklift Systems, Inc., 510 U.S. 17,21 (1993) (citing Meritor Savings Bank v Vinson, 477 U.S. 57,67 (1986). The alleged harassment must be sufficiently pervasive, and "mere utterance of an... *epithet* which engenders

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[35] The temporal scope of Title VII is governed by 42 U.S.C. §2000e-5(e). To pursue relief under the FEHA or Title VII, a plaintiff must, within one year or 300 days of the alleged unlawful act, file an administrative complaint with an agency. Cal. Govt. Code §12960; 42 U.S.C. §2000e-5(e), See also United Airlines v Evans, 431 U.S. 553, 557-58 (1977). In Evans, the Supreme Court held that a discriminatory act, not merely the effects of a past discriminatory act, must occur within the limitations period. Id.

An employee can establish discrimination under the doctrine of continuing violations by showing a systematic policy and practice of discrimination, which occurs at least partially within the applicable limitations period. Green v Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989). Maurey, however, does not allege a systematic policy and practice of discrimination. Therefore, he must demonstrate a series of discriminatory events, one or more of which must fall within the 1-year (Title VII) or 300-day period (FEHA) preceding his first EEOC complaint.

offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." Id.; See also Snell v Suffolk County, 782 F.2d 1094, 1103 (2nd Cir. 1986) (a "few, isolated incidents of racial enmity" and "casual comments, or accidental or sporadic conversation" do not "trigger equitable relief" under Title VII). Courts have also applied the McDonnell Douglas Corp. framework to hostile environment harassment claims with respect to the shifting burdens between the parties. McDonnell Douglas v Green, 411 U.S. 792,802 (1973).

Plaintiffs claim of harassment is time-barred. Maurey filed his first EEOC complaint on February 10, 1997.[36] To pursue a claim for harassment under FEHA or Title VII, plaintiff must, within one year or 300 days of the alleged unlawful act, have filed an administrative complaint with an agency. Therefore, any comments forming the basis of Maurey's harassment claim must have occurred within the year preceding the February 10, 1997 filing of his first complaint.,no earlier than February 10, 1996. Both of Blakely's comments were allegedly made before 1996, specifically, in 1994 and 1995.

Plaintiffs attempt to save his claim by belatedly introducing inadmissible evidence not produced in discovery is unavailing.[37]

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[36] Plaintiff did not allege racial "harassment" in any of his three EEOC complaints filed February 10, 1997, April 22, 1997, and November 13,1997. He did, however, claim racial discrimination in his first (February 1997) complaint.

[37] 23 Plaintiff twice swore under oath that certain tape recordings he had made of conversations with Blakely no longer existed. When asked a third time, plaintiff acknowledged the existence of the tapes, but objected to producing them on the grounds that they were "not relevant" and "not reasonably calculated to lead to the discovery of admissible evidence." Def. Mot., Sbarbaro Supp. Dec., Exhs. N, 0, P. In his opposition, plaintiff attempted to rely on evidence allegedly contained on the tapes but never provided to the court. Even if the tapes contained the statements plaintiff claims, the court would not reward plaintiffs sandbagging by allowing their admission. Moreover, assuming the tapes contain the statements plaintiff claims, the remarks are, at most, stray comments, unrelated to any employment decision concerning plaintiff. See Price Waterhouse v Hopkins, 490 U.S. 228, 251 (1989); Dehorned v Bank of America, 879 F.2d 459, 468 (9th Cir. 1989).

The only statements properly before this court were allegedly made in 1994 and 1995. Plaintiffs claim is thus time-barred.

Even were the court to consider the merits of plaintiffs claim, his claim for harassment fails. The two comments, made in different years, were isolated and not pervasive. In addition, the comments were not so severe as to cause a reasonable juror to find that Maurey was subjected to a hostile environment.[38] Therefore, this court grants defendants' motion for summary adjudication of plaintiffs first and second claims for harassment in violation of Title VII and the FEHA.

4. Breach of Contract

Plaintiff makes two separate contract claims: I) breach of the implied contract not to terminate except for "good cause"; and 2) breach of certain representations and safeguards USC promised separate and apart from any "good cause" requirement. PI. Opp., p. 25. Plaintiff contends that when he joined USC in 1988, he attended a new employee orientation session and"[a] speaker welcomed the new hires to the 'Trojan family,' and reiterated that USC would always work hard to retain them and help them grow in their careers." Id. Plaintiff alleges that he was not hired on an "at-will" basis, but instead was promised "exactly the opposite: long-term employment, career growth, and affirmative protection in the event of layoff." Id.

California law establishes a presumption that employment relationships may be terminated at will by either party upon notice to the other. Cal. Lab. Code §2922. This presumption may be modified by evidence of an express written or oral employment contract, or by evidence of an implied-in-fact employment contract. Foley v Interactive Data Corp., 47 Ca1.3d 654, 665

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[38] A reference to "my people" is not necessarily offensive, and Maurey fails to establish that the remark even referred to race. In addition, the exchange concerning the "white chauffeur" is not necessarily hostile and certainly not presumptively so. Taken in the worst possible light, they fail to justify an inference of pervasive harassment or a hostile work environment.

(1988). The existence of an implied-in-fact contract is normally a question for the trier of fact. Foley, 47 Cal.3d at 681-82. However, where the undisputed facts admit of only one conclusion, summary judgment is appropriate. Davis v Consol. Freight ways, 29 Cal. App.4th 354, 366 (1994).

Several times in the course of his employment at USC, plaintiff signed employment applications containing at-will clauses expressly stating that his employment with USC could be terminated without cause, that only the President of the University could alter the at-will nature of his employment, and that any such alteration must be in writing. In 1992, before accepting a new job as director of the Center, plaintiff again signed and dated an application which states in section 4: "I . . . agree that my employment and compensation can be terminated at-will, with or without cause, at any time, either at my option or at the option of USC." Def Mot., Sbarbaro Dec., Exh. 38, p. 3. Finally, plaintiff testified that the President of the University never sent him a letter altering his at-will employment status.

Plaintiff offers no evidence of any other employment contract or of an implied-in-fact contract. Although plaintiff now alleges that he did not believe he was bound by the at-will contracts he signed, he testified at his deposition that he understood, read, and signed the contracts, and therefore, cannot now contradict his prior deposition testimony. Def. Mot., Maurey Depo., p. 777; Def. Mot., Sbarbaro Dec., Exhs. 37, 38, 42; see also Kennedy v Allied Mut. Ins Co, 952 F.2d 262, 267 (9th Cir.1991)(citing, Radobenko v Automated Equipment Corp., 520 F.2d 540, 544 (9110 Cir. 1975)) (party may not raise genuine issue of fact by "sham" declaration contradicting his prior deposition testimony).[39]

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[39] Plaintiffs declaration is replete with inadmissible evidence, much of which directly contradicts his deposition testimony. As outlined in Defendants' Evidentiary Objections, plaintiffs declaration contradicts his sworn deposition testimony with respect to (1) his understanding of his USC employment contract; (2) the termination of funding for the Center plaintiff directed; and (3) the date when he first saw the form containing the hearing requirements for the RTTC project manager positions. Moreover, plaintiff testified to only one allegedly discriminatory remark made by Blakely to him and confirmed under oath that

Plaintiffs breach of contract claim fails as a matter of law. Plaintiff was an at-will employee and could be terminated or could have quit his job, with or without cause, at any time. Plaintiff adduces no evidence that his at-will status was ever converted into a terminable-for-cause-only employment contract.[40] This court grants defendants' motion for summary adjudication on plaintiffs sixth claim for breach of contract.

5. Disability Discrimination in Violation of Public Policy

Plaintiff claims that both Dozier and Suckow knew of his hearing disability and used essential function forms, requiring directional hearing, to exclude him from the two RTTC jobs he had applied for in 1997. PI. Opp., p. 27. Plaintiff argues that directional hearing is not required for the two RTTC positions, and that an unnecessarily high hearing requirement was selected by Suckow because she wanted to retaliate against him. Id. Plaintiff also argues that as a matter of law, he is not required to allege a causal link between his disability and the adverse employment action and cites Hashimoto v Dalton, 118 F.3d 671 (9th Cir. 1997) for this proposition.[41] Id. p. 29.

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there were no others. Id. To the extent allegations contained in plaintiffs declaration contradict his prior deposition testimony, the court disregards them. See April 30, 1999 Order; Ashton-Tate Corp v Ross, 916 F.2d 516, 520 (9th Cir. 1990)("the process of evaluating a summary judgment motion would be flouted if requests for more time, discovery, or the introduction of supplemental affidavits had to be considered even if requested well after the deadline set for the introduction of all information needed to make a ruling has passed."); cf. Kennedy v Allied Mut Ins Co, 952 F.2d 262, 267 (9th Cir. 1991).

[40] Moreover, for the reasons set forth above, USC had ample cause to terminate plaintiffs employment.

[41] In Hashimoto v Dalton, 118 F.3d 671, 674 (9th Cir. 1997), the Ninth Circuit held that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by discriminatory intent. There, both the EEOC and the district court found that Hashimoto's supervisor, Lowery, gave her a negative reference in retaliation for her filing an EEOC complaint for race and gender discrimination. The Court noted that the dissemination of the

Defendants counter that Maurey's claim is time-barred because the one-year statute of limitations on this claim began to run when he suspected or should have suspected that his injury was caused by wrongdoing. Def. Mot., p. 23. Maurey filed an internal USC complaint alleging disability discrimination in November 1996, and testified he "suspected" he was the victim of disability discrimination in July 1996. Def. UF,¶E1. However, Maurey did not amend his complaint to add a public policy disability discrimination claim until October 30, 1998. Id. ¶ E5.

In addition, defendants contend that Suckow and Dozier were not even aware of Maurey's disability, because an affirmative action form completed by both Suckow and Dozier for the first RTTC position, which lists disability status, among others, shows Maurey as not having a disability. Id., ¶E7. Defendants also argue that the selection of a higher hearing requirement was not an intentional act directed against Maurey; rather, the essential function form for both RTTC Project Manager positions were copied from a template that also included the same mid-level hearing requirement, generated long before Maurey ever complained of racial discrimination. Id., E8. In addition, every essential functions form for every Project Manager position in the WESRAC Department of the School of Engineering, from March 1994, through August 1998, including both RTTC Project Manager positions at issue, have the same mid-level

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adverse job reference violated Title VII because it was a "personnel action" motivated by retaliatory animus. Id. at 676. Thus, it is was irrelevant that Lowery's dissemination of the negative job reference was not the reason Hashimoto was denied the job she applied for.

Here, Maurey fails to present any evidence of retaliatory or discriminatory intent. He presents no causal link between his February 1997 filing of an EEOC complaint against Blakely, and his interview and job application review by Dozier and Suckow. Nor can he claim that Dozier and Suckow discriminated against the hearing disabled. One of the applicants hired by Dozier and Suckow shared Maurey's disability. Charles Wilcox is also deaf in one ear. Finally, plaintiff does not argue that filling out generic essential function forms is a personnel action.

hearing requirement checked. Id., E9. Finally, defendants argue that Maurey cannot show that he was denied the jobs in question due to his disability, because Charles Wilcox, the candidate hired for one of the RTTC positions, is also deaf in one ear.

In order to prevail on a cause of action for wrongful termination in violation of Government Code section 12940, plaintiff must prove: 1) he is a disabled person, as defined in the FEHA; 2) he is qualified to perform the duties of the position with or without reasonable accommodation; and 3) he suffered an adverse employment action because of his disability. Pensinger v Bowsmith Inc., 60 Cal.App.4th 709, 719 (1997). In applying the FEHA, federal and state courts have employed the shifting burden of proof applied to Title VII discrimination claims as established in McDonnell Douglas Corp v Green, 411 U.S. 792,802 (1973). In addition, the one-year statute of limitations set forth in §340(3) of the California Code of Civil Procedure governs claims for wrongful termination in violation of public policy. Barton v New United Motor Mfg, Inc, 51 Cal. Rptr. 2d 328 (1996) (because the primary nature of the right sued upon in a [public policy] wrongful termination is personal, the one-year statute of limitations specified in §340(3) applies).

Plaintiff s claim is time barred. Plaintiff did not move to amend his complaint to add a claim for disability discrimination in violation of public policy until October 30,1998, more than a year after he was advised he had been denied the RTTC Project Manager positions on March 20 and October 6, 1997, and almost 2 years after he filed an internal USC complaint alleging, inter alia, disability discrimination in November 1996.[42]

Moreover, on the merits, and assuming plaintiff was qualified for the two RTTC positions for which he applied, plaintiff fails to establish the third prong of the prima facie case of disability

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[42] Although plaintiff alleges that he did not realize he had a disability claim until September 1998, his allegation again contradicts his deposition testimony. Maurey Deposition, pp. 492-493; see a.1.so Def. Reply to PI. Stat. of Gen. Ins., pp. 30-32.

discrimination, disability discrimination, viz., a causal link between his disability and the adverse employment action. There is no evidence of discrimination on the part of Suckow or Dozier. Plaintiff admits that on every form used for every project manager position in WESRAC from March 1994 to August 1998, including both RTTC positions at issue, the mid-level hearing requirement was checked. Maurey Deposition, p. 1380-1382.

Finally, there is no evidence the decision makers who were selecting applicants for these two positions were averse to hiring an applicant with a hearing disability. Whatever the reason for the apparent requirement of mid-level hearing capability, both sides concede it was not observed. One of the two candidates hired, Charles Wilcox, like Maurey, is deaf in one ear. Maurey responds that "this proves that bilateral hearing is not required for the position proving that the requirement is excessive - and that Defendants are apparently not prejudiced against the deaf, just against Plaintiff. . . ." Plaintiff's Genuine Issues in Opposition to Defendants' Summary Judgment Motion, ¶E10. Plaintiff's concession that defendants are not prejudiced against the deaf precludes any claim that he could have suffered an adverse employment action because of his disability. This court grants defendants' motion for summary adjudication of plaintiffs tenth claim for disability discrimination in violation of public policy.

IV
CONCLUSION

For the reasons set forth above, this court:

1. GRANTS defendants' motion for summary adjudication on plaintiffs first claim for discrimination and harassment under Title VII, 42 U.S.C. §2000(e).

2. GRANTS defendants' motion for summary adjudication on plaintiff's second claim for discrimination and harassment under the Fair Employment and Housing Act (FEHA)
Gov. Code, §12940 £Qq.

3. GRANTS defendants' motion for summary adjudication on plaintiff's third claim for retaliation under Title VII.

4. GRANTS defendants' motion for summary adjudication on plaintiff's fourth claim for retaliation under FEHA.

5. GRANTS defendants' motion for summary adjudication on plaintiff's sixth claim for breach of contract.

6. GRANTS defendants' motion for summary adjudication on plaintiff's ninth claim of tortious termination or refusal to hire in violation of public policy under FEHA.

7. GRANTS defendants' motion for summary adjudication on plaintiffs tenth claim for disability discrimination in violation of public policy.

On January 8, 1999, Judge Morrow granted defendants' motion dismissing plaintiff's seventh and eighth claims for breach of the covenant of good faith and fair dealing and tortious interference with contract. As noted above, in this motion, plaintiff concedes that he cannot maintain his fifth claim for discrimination in violation of 42 U.S.C. §§1981 and 2000(d).

The defendants' motion for summary judgment is granted on the grounds that there are no triable issues of material fact as to any of plaintiffs claims. Judgment on plaintiff's First Amended Complaint shall be entered in favor of defendants.

IT IS SO ORDERED.
DATED: July 1, 1999
Nora M. Manella
United States District Judge

Filed U.S. District Ct. of Appeals: June 21, 2001
Filed U.S. District Court: Sept. 6,2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-56381

D.C. No. CV-98-02900-NM
(AIJ)

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Nora M. Manella, District Judge, Presiding
Argued and Submitted June 5, 2001
Pasadena, California

Before: TROTT, TASHIMA, and W. FLETCHER, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Plaintiff-Appellant Eugene John Maurey ("Maurey") sued the University of Southern California ("USC")and Edward Blakely, the Dean of USC's School of Urban and Regional Planning ("Dean Blakely") (collectively referred to as "defendants"), alleging several causes of action related to his employment at USC.

Maurey claims that he was fired and not rehired as the director of a federally funded program at USC because of his race and in violation of his employment contract. After various pre-trial proceedings, the district court granted summary judgment in favor of defendants. Maurey timely appealed, and we have jurisdiction pursuant to 28 U.S.C. §1291 (2000). We AFFIRM.

Because the parties are familiar with the facts of this case, we recount them here only where necessary to explain our decision.

DISCUSSION

1. Recusal

Maurey sought to recuse the presiding judge, Judge Manella, based on Judge Manella's affiliations with USC Law School. Pursuant to court rules, Maurey's recusal motion was referred to another district court judge, Judge King, for decision. Judge King refused to recuse Judge Manella.

We review for an abuse of discretion Judge King's refusal to recuse Judge Manella. Hochman v. Nackman, 145 F.3d 1069, 1076 (9th Cir. 1998). As discussed below, Judge King did not abuse his discretion.

Judge King correctly determined that the facts that Judge Manella (1) is an alumna of USC Law School, (2) donated small yearly contributions to the law school, (3) participated in a law school fundraiser by donating her presence at an auctioned-off meal[43] and (4) served as a guest judge at USC Law School's moot

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[43] We note that when Judge Manella participated in the USC Law School fundraiser, she was not a federal district court judge. Rather, she was the United States Attorney for the Central District of California. Accordingly, we are not asked to opine on whether *judicial* participation in such fundraising efforts is consistent with the Code of Conduct for United States Judges.

court competition, amount to no more than ordinary involvement of an alumna with her alma mater and do not call into question her impartiality. See Hochman, 145 F.3d at 1076 (finding similar affiliations to be "minimal alumni contacts" that did not call into question the judge's impartiality); see also Lunde v. Helms, 29 F.3d 367,370 (8th Cir. 1994) (same).

Judge King noted that Judge Manella's membership on USC Law School's Board of Councilors was more than ordinary alumni contact with her alma mater. However, by itself, the existence of such a relationship does not show that Judge Manella has a financial interest in or is a fiduciary of USC. See 28 U.S.C. § 455(b)(4). As Judge King correctly observed, Maurey makes no "allegations that Judge Manella's role on the Board of Councilors entangled her with any USC, or even Law School, financial interests that are related to this suit."

Judge King did not abuse his discretion in refusing to recuse Judge Manella from presiding over Maurey's case against USC and Dean Blakely.[44]

2. Maurey's Request to Reopen Discovery

After discovery was closed and after the defendants had filed their motions for summary judgment, Maurey's attorney asked the district court to reopen discovery so that he could depose certain witnesses. The district court rejected the request, finding that Maurey's attorney had not been diligent in pursuing discovery. We review for an abuse of discretion the district court's refusal to reopen discovery before ruling on summary judgment. Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir.1995).

Maurey bears the burden of showing the necessity for more time and why the previously allotted time was insufficient. See id.

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[44] We reject also Maurey's claim that he was denied due process because Judge King is himself an alumnus of USC Law School. First, Maurey identifies nothing about Judge King's relationship with USC Law School that amounts to more than ordinary alumnus involvement with his alma mater. See Hochman, 145 F.3d at 1076. Second, the fact that Maurey's recusal motion was referred to an independent judge supports our conclusion that Maurey was afforded due process.

"We will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment." Byrd v. Guess, 137 F.3d 1126, 1135 (9th Cir.1998) (citation omitted).

Judge Manella's finding that Maurey's attorney was not diligent in conducting discovery is amply supported by the record. Among other things, Judge Manella already extended the discovery deadline once from January 31 to February 22, 1999. Despite this extension, and despite several offers from defense counsel, Maurey's attorney failed to depose within the extended deadline the witnesses he now deems critical.

3. Evidentiary Rulings During Summary Judgment

In ruling on defendants' summary judgment motions, the district court (a) considered the declaration of EDA official Leonard Smith, and (b) refused to consider the recanted declaration of Thomas McClure, the head of the critical peer review team. We review for an abuse of discretion these types of evidentiary rulings. See Kennedy v. Collagen Corp., 161 F.3d 1226, 1227 (9th Cir. 1998).

a. Leonard Smith's Declaration

According to Maurey, Leonard Smith's declaration was unlawful and inadmissible because EDA regulations prevent EDA officials, like Smith, from giving testimony absent the express consent of the EDA General Counsel. We disagree. Even if Smith violated EDA internal regulations by providing a declaration without the consent of the EDA General Counsel or other authorized official, see 15 C.F.R. §15.13, his declaration is not inadmissible. In fact, the regulations clearly state:

> If an employee is unaware of the regulations in this subpart and provides expert or opinion testimony regarding official DOC information, subjects or activities without the aforementioned consultation, the witness shall, as soon after testifying as possible, inform the General Counsel. . . that such testimony was given and provide a written summary of the expert or opinion

testimony provided.

15 C.F.R. §15.16. Accordingly, the "remedy" for Smith's alleged failure to obtain the consent of the EDA General Counsel is for Smith to inform the EDA General Counsel that he gave a declaration and provide a summary of that declaration. See id. The declaration need not be stricken. See id.

b. Thomas McClure's Declaration

Maurey next claims that the district court should have considered Thomas McClure's declaration, even though it had been sent by mistake, because "[a]t worst, Mr. McClure's request to withdraw his declaration created a triable issue as to what his testimony -- and hence the true facts of this case -- really are." Without belaboring the point, it is clear that well before the summary judgment hearing, McClure made it abundantly lucid to everyone involved, including Maurey's counsel, that his secretary faxed the declaration by mistake. A court need not consider such a declaration. See United States v. Holst, 897 F.Supp. 474,415 (D.Or. 1995) (noting that witness "has withdrawn that declaration and [the court].need not address it further").

4. Summary Judgment Decisions

The district court granted summary judgment in favor of defendants on Maurey's reverse race discrimination and breach of contract claims. We review de novo the district court's grants of summary judgment. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1997). The test is whether, viewing the evidence in the light most favorable to the non-moving party (Maurey), there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id.

a. Race Discrimination Claim

In race discrimination cases, the Supreme Court has developed a three-part test for courts to apply: (1) the plaintiff must first prove a prima facie case of race discrimination; (2) if the plaintiff meets this burden, the burden of production shifts to the defendants to offer a legitimate, nondiscriminatory reason for their actions; (3) the plaintiff must then produce evidence which raises a genuine

factual issue as to whether defendant's reasons are merely a pretext for racial discrimination. If plaintiff's evidence is lacking, summary judgment is proper for defendant. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)); Nidds, 113 F.3d at 916-18.

Assuming *arguendo* that Maurey demonstrated a prima facie case of discrimination, which is questionable, we agree with Judge Manella that defendants offered a legitimate, nondiscriminatory reason for firing and not rehiring Maurey as the director of the University Center -- Maurey's poor performance. Contrary to Maurey's characterization, the Peer Review Report was critical of Maurey and his director capabilities. The report initially describes the Center as "a one-man program" with Maurey being that man, and then maligns the Center for its lack of a "strategic plan," its "fractious approach to community and economic development," and its failure to "understand [the] purpose of [the] EDA University Center Program." Further, Leonard Smith of the EDA instructed Dean Blakely to put together a "fresh team" for the new Center because the old Center's performance, under Maurey's directorship, had not been up to par. The critical peer review report and Smith's instructions provided to defendants a legitimate, non-discriminatory reason for not rehiring Maurey as the director of the Center.

Maurey responds that Dean Blakely's alleged history of anti-white animus shows that defendants' non-discriminatory reason is merely pretextual. Among other things, Maurey claims that Dean Blakely described Maurey to another USC official, Dean David Shawaker, as having "two strikes against him in economic development. First, he isn't black or Hispanic. Second, he lacks demonstrated credentials." However, Dean Shawaker testified that "Dean Blakely was making a dispassionate observation about the community, which still harbors some racial bias, rather than expressing a racist bias in himself." Similarly, Dean Blakely declared that his comment to Dean Shawaker only reflected complaints he had received from the community about Maurey. Maurey offered no evidence to rebut the contextual gloss provided by Deans Blakely and Shawaker, and thus he failed to

raise a genuine issue of material fact regarding pretext. See Nidds, 113 F.3d at 916-18.

Furthermore, Maurey's allegations in no way impugn the credibility of the peer review report itself. Judge Manella summed it up best:

> The Peer Review Report was conducted by competent professionals who were affiliated neither with Blakely nor with USC. Maurey produces no evidence showing the defendants "cooked up" the report in order to fire him. In fact, Maurey does not attack the credibility of the report at all, and presents no evidence from which a reasonable fact finder could conclude that the true reason Maurey was not rehired was anti-white animus.

In sum, Maurey's allegations of racial bias, wholly without evidentiary support, are insufficient to show pretext, and thus do not defeat the defendants' summary judgment motion. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 890-91(9th Cir. 1994).

b. Breach of Contract Claim

Maurey admits that he signed an at-will employment agreement with USC in 1992. However, he argues that USC administrators made several comments that led him to believe he could only be fired for cause.

California case law forecloses Maurey's argument. The California Supreme Court recently noted that "most cases applying California law. . . have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1103 (Cal. 2000). Maurey's assertion that USC officials intimated that he could be fired only for cause cannot create an implied contract in the face of the written, signed at-will employment contract. See id.; see also Starzynski v. Capital Pub. Radio, 105 Cal.Rptr.2d 525, 529 (Cal. Ct. App. 2001)("[P]laintiff's assertion that his supervisor gave him oral

assurances of continued employment cannot create an implied contract in the face of the written acknowledgment signed by plaintiff that his employment was at-will."). Given Maurey's failure to show actionable discrimination, his at-will employment agreement ends our inquiry.

5. Dismissal on the Pleadings

Maurey's sixth claim for relief, entitled "Breach of Contract," alleged that USC breached its employment contract with Maurey by firing him without good cause. Maurey's seventh claim for relief, entitled "Breach of Covenant of Good Faith and Fair Dealing," alleged that the employment contract between Maurey and USC contained an implied covenant of good faith and fair dealing, which USC breached when it fired Maurey. The district court dismissed on the pleadings Maurey's seventh claim because it was duplicative of the sixth.

We review de novo the district court's decision to dismiss Maurey's seventh cause of action, see Fariado v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir.1999), and in doing so, we look to California cases for guidance in determining whether Maurey's two state law claims are duplicative.

Maurey argues that his claim for breach of the implied covenant of good faith is distinct from his claim for breach of contract because "[a]n employee whose express contract claims are barred by the 'at-will' doctrine may still have a bad faith claim." The California Supreme Court has clearly rejected Maurey's argument, stating:

> [I]nsofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract tern, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because. . . the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by the law therein is *solely contractual*. In the employment context, an implied covenant theory affords no separate *measure of recovery* such as tort damages. Allegations that the breach was

> wrongful, in bad faith, arbitrary, and unfair are unavailing; there is not tort of "bad faith breach" of an employment contract.

Guz, 8 P.3d at 1112 (citations omitted).

Thus, the district properly dismissed on the pleadings Maurey's claim for breach of the implied covenant of good faith and fair dealing.

AFFIRMED.

Filed U.S. Court of Appeals: Aug 23, 2001
Filed U.S. District Court: Sept 6, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-56381
D. C. No. CV-98-02900-NM
(AIJ)

ORDER

Before: TROTT, TASHIMA, and W. FLETCHER, Circuit Judges.

The memorandum disposition filed June 21,2001, is hereby amended as follows:

At 2001 WL 700541, *4 (9th Cir. 2001), after the sentence "Given Maurey's failure to show actionable discrimination, his at-will employment agreement ends our inquiry." *ADD THE FOLLOWING*:

In a petition for rehearing, Maurey acknowledges Guz, but contends that it is simply not applicable to his case. Specifically, Maurey claims that his application for employment is just that - a non-binding application for employment, not an express written agreement between parties. Because the application is non-

binding, Maurey argues that he should be permitted to introduce evidence outside of the application form to demonstrate that USC could fire him only for cause.

Selected language from some California cases seems to support Maurey's line of argument. See, e.g., Harden v. Maybelline Sales Corp.,230 Cal.App3d 1550, 1555 (Cal. Ct. App. 1991)([A]n application for employment is not a contract; it is a mere solicitation of an offer for employment.... As such the application cannot constitute an agreement, let alone a partially integrated agreement."). Most California cases, however, hold that in certain circumstances, an employment application's "at will" provision can constitute a partially integrated agreement with respect to the grounds required for termination. See, e.g., Wagner v. Glendale Adventist Med. Ctr.,216 Cal. App.3d 799, 805 (Cal. Ct. App. 1989) (holding that while an employment application "cannot, in and of itself, be an integration...the parties may have intended the 'at-will' provision to be the final and complete expression of one term, incorporated into the contract of employment they ultimately concluded."); Slavinsky v. Watkins--Johnson Co., 221 Cal. App.3d 799,805 (Cal. Ct. App. 1990)(considering the circumstances surrounding an application for employment to determine if it was integrated with respect to termination aspect); McLain v. Great Amer. Ins. Cos., 208 Cal. App.3d 1476, 1484 (Cal. Ct. App. 1989)(same).

Viewing the circumstance surrounding Maurey's application for employment, we conclude that "the parties. . . intended the 'at-will' provision to be the final and complete expression of one term, incorporated into the contract of employment they ultimately concluded." Wagner v. Glendale Adventist Med. Ctr., 216 Cal. App.3d at 1387. First, the language of the application was clear and unmistakable. It stated that Maurey could be terminated "at-will, with or without cause, and with or without notice, at any time, either at my option or at the option of USC." The form also indicated that the "at-will" nature of employment could be altered only "in writing" by the "President

of USC." Testifying about these provisions at his deposition, Maurey admitted that he read, understood, and signed the application, and that USC's President never gave him anything in writing that altered its terms. In short, this is not a case where the language of the application form was confusing or contradictory. See McLain, 208 Cal.App3d at 1485 (finding application not integrated because it stated that the "at-will" language "could be changed at any time"). Second, because Maurey's position was contingent upon annual government funding, he was required to and did complete the application form each year between 1992 and 1996. After repeatedly signing the application form, including the unambiguous "at-will" provisions, Maurey cannot claim that USC led him to believe that he could be fired only for cause.

For these reasons, we hold that Maurey is precluded from arguing that the at-will provisions of the application form are not conclusive and binding on him.

With these amendments, the petition for rehearing filed July 20, 2001, is DENIED.

Code of Federal Regulations, Title 15, Part 15, Subpart B, Sections 15.11-15.16 (1999):
Section 15.12:
(a) This subpart sets forth the policies and procedures of the Department of Commerce regarding the testimony of employees ... as witnesses in legal proceedings and the production or disclosure of information contained in Department of Commerce documents for use in legal proceedings pursuant to a request, order, or subpoena (collectively referred to in this subpart as a "demand")...
(d) This subpart is not intended to be relied upon to, and does not, create any right or benefit, substantive or procedural, enforceable at law by any party against the United States.

Sec. 15.12 Definitions.
For the purpose of this subpart:
(a) Agency counsel means the chief legal officer (or his/her designee) of an agency within the Department of Commerce.
(b) Component means Office of the Secretary or an operating unit of the Department as defined in Department Organization Order 1-1.
(c) Demand means a request, order, or subpoena for testimony or documents for use in a legal proceeding.
(d) Department means the United States Department of Commerce and its constituent agencies.
(e) Document means any record, paper and other property held by the Department, including without limitation, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes and sound or mechanical reproductions.
(f) Employee means all current or former employees or officers of the Department, including commissioned officers of the National Oceanic and Atmospheric Administration and any other individual who has been appointed by, or subject to the supervision, jurisdiction or control of

the Secretary of the Department of Commerce.
(g) General Counsel means the General Counsel of the Department or other Department employee to whom the General Counsel has delegated authority to act under this subpart.
(h) Legal proceeding means all pretrial, trial and post trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards or other tribunals, foreign or domestic. This phrase includes all phases of discovery as well as responses to formal or informal requests by attorneys or others involved in legal proceedings.
(i) Official business means the authorized business of the Department.
(j) Secretary means the Secretary of the Department of Commerce.
...
(l) Testimony means a statement in any form, including personal appearances before a court or other legal tribunal, interviews, depositions, telephonic, televised, or videotaped statements or any responses given during discovery or similar proceedings, which response would involve more than the production of documents. ...

Sec. 15.13 Demand for testimony or production of documents: Department policy.
No employee shall in response to a demand, produce any documents, or provide testimony regarding any information relating to, or based upon Department of Commerce documents, or disclose any information or produce materials acquired as part of the performance of that employee's official duties, or because of that employee's official status without the prior authorization of the General Counsel, or the Solicitor, or the appropriate agency counsel. The reasons for this policy are as follows:
(a) To conserve the time of Department employees for conducting official business;
(b) To minimize the possibility of involving the Department in controversial issues that are not related to the Department's mission;
(c) To prevent the possibility that the public will misconstrue

variances between personal opinions of Department employees and Department policy;
(d) To avoid spending the time and money of the United States for private purposes;
(e) To preserve the integrity of the administrative process; and
(f) To protect confidential, sensitive information and the deliberative process of the Department.

Sec. 15.14 Demand for testimony or production of documents: Department procedures.
(a) Whenever a demand for testimony or for the production of documents is made upon an employee, the employee shall immediately notify the General Counsel ... or appropriate agency counsel....
(b) A Department employee may not give testimony, produce documents, or answer inquiries from a person not employed by the Department regarding testimony or documents subject to a demand or a potential demand under the provisions of this subpart without the approval of the
General Counsel, or the Solicitor, or the appropriate agency counsel. A Department employee shall immediately refer all inquiries and Demands to the General Counsel, or the Solicitor, or appropriate agency counsel. Where appropriate, the General Counsel, or the Solicitor, or appropriate agency counsel, may instruct the Department employee, orally or in writing, not to give testimony or produce documents.
(c)(1) Demand for testimony or documents. A demand for the testimony of a Department employee shall be addressed to the General Counsel, Room 5890, Department of Commerce, Washington, DC 20230 or appropriate agency counsel. A demand for testimony of an employee of the Patent and Trademark Office shall be mail addressed to the Solicitor, Box 8, Patent and Trademark Office, Washington, DC 20231; or in person to 2121 Crystal Drive, Crystal Park 2, Suite 918, Arlington, Virginia 22215.
(2) Subpoenas. A subpoena for testimony by a Department employee or a document shall be served in accordance with the

Federal Rules of Civil or Criminal Procedure or applicable state procedure and a copy of the subpoena shall be sent to the General Counsel, or the Solicitor, or
appropriate agency counsel.
(3) Affidavit. Except when the United States is a party, every demand shall be accompanied by an affidavit or declaration under 28 U.S.C. 1746 or, if an affidavit is not feasible, a statement setting forth the title of the legal proceeding, the forum, the requesting party's interest in the legal proceeding, the reason for the demand, a showing that the desired testimony or document is not reasonably available from any other source, and if testimony is requested, the intended use of the
testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony. The purpose of this requirement is to assist the General Counsel, or the Solicitor, or appropriate agency counsel in making an informed decision
regarding whether testimony or the production of a document(s) should be authorized.

...

(f) The General Counsel, or the Solicitor, or appropriate agency counsel may consult or negotiate with an attorney for a party or the party if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or obtain information necessary to make the determination required by paragraph (b) of this section. Failure of the attorney to cooperate in good faith to enable the General Counsel, or the Solicitor, or the Secretary, or the appropriate agency counsel to make an informed determination under this subpart may serve, where appropriate, as a basis for a determination not to comply with the demand.
(g) A determination under this subpart to comply or not to comply with a demand is not an assertion or waiver of privilege, lack of relevance, technical deficiency or any other ground for noncompliance.
(h) The General Counsel, or the Solicitor, or appropriate agency counsel may waive any requirements set forth under this section when circumstances warrant.

Sec. 15.15 Procedures when a Department employee receives a subpoena.

(a) A Department employee who receives a subpoena shall immediately forward the subpoena to the General Counsel, or the appropriate agency counsel. ... The
General Counsel, or the Solicitor, or appropriate agency counsel will determine the extent to which a Department employee will comply with the subpoena.

(b) If an employee is served with a subpoena that the General Counsel ... or appropriate agency counsel determines should not be complied with, the ... counsel will attempt to have the subpoena withdrawn or modified. If this cannot be done, the ... counsel will attempt to obtain Department of Justice representation for the employee and move to have the subpoena modified or quashed. If, because of time constraints, this is not possible prior to the compliance date specified in the subpoena, the employee should appear at the time and place set forth in the subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of the Department's regulations and inform the legal tribunal that he/she has been advised by counsel not to provide the requested testimony and/or produce documents. If the legal tribunal rules that the demand in the subpoena must be complied with, the employee shall respectfully decline to comply with the demand. United States ex rel. Touhy v. Ragen, 340 U. S. 462 (1951).

(c) Where the Department employee is an employee of the Office of the Inspector General, the Inspector General in consultation with the General Counsel, will make a determination under paragraphs (a) and (b) of this section.

Sec. 15.16 Legal proceedings between private litigants: Expert or opinion testimony.

In addition to the policies and procedures as outlined in Secs. 15.11 through 15.16, the following applies to legal proceedings between private litigants:

(a) If a Department employee is authorized to give testimony in a legal proceeding not involving the United States, the testimony, if

otherwise proper, shall be limited to facts within the personal knowledge of the Department employee. Employees, with or without compensation, shall not provide expert testimony in any legal proceedings regarding Department information, subjects or activities except on behalf of the United States or a party represented by the United States Department of Justice. However, upon a showing by the requester that there are exceptional circumstances and that the anticipated testimony will not be adverse to the interest of the
Department or the United States, the General Counsel ... or appropriate agency counsel may, in writing grant special authorization for the employee to appear and give the expert or opinion testimony.
(b)(1) If, while testifying in any legal proceeding, an employee is asked for expert or opinion testimony regarding official DOC information, subjects or activities, which testimony has not been approved in advance in accordance with the regulations in this subpart, the witness shall:
(i) Respectfully decline to answer on the grounds that such expert or opinion testimony is forbidden by the regulations in this subpart;
(ii) Request an opportunity to consult with the General Counsel ... or appropriate agency counsel before giving such testimony; and
(iii) Explain that upon such consultation, approval for such testimony may be provided.
(2) If the witness is then ordered by the body conducting the proceeding to provide expert or opinion testimony regarding official DOC information, subjects or activities without the opportunity to consult with either the General Counsel, or the Solicitor, or appropriate agency
counsel, the witness shall respectfully refuse to provide such testimony. See United States ex rel. Touhy v. Ragen, 340 U. S. 462 (1951).
(c) If an employee is unaware of the regulations in this subpart and provides expert or opinion testimony regarding official DOC information, subjects or activities in a legal proceeding without the aforementioned consultation, the witness shall, as soon after

testifying as possible, inform the General Counsel, or the Solicitor, or appropriate agency counsel that such testimony was given and provide a written summary of the expert or opinion testimony provided.